Supreme Court, U.S.
FILED

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No.

In the
Supreme Court of the United States

DR. DONALD C. AUSTIN,

Petitioner,

vs.

AMERICAN ASSOCIATION OF NEUROLOGICAL SURGEONS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a private association of neurological surgeons impermissibly interferes with the judicial system by punishing its members for giving admissible expert testimony in medical malpractice cases pursuant to a process whereby only doctors who testify for plaintiffs will be punished.

Whether a private association of neurological surgeons impermissibly interferes with the judicial system by punishing its members for giving admissible expert testimony in medical malpractice cases.

Whether a private association impermissibly interferes with the judicial system by punishing its members for giving admissible expert testimony.

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The district court's decision denying respondent's motion to dismiss is reported at 47 F. Supp. 2d 941. The district court's decision granting respondent's motion for summary judgment is reported at 120 F. Supp. 2d 1151. The circuit court's decision affirming the district court is reported at 253 F.3d 967.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 2001. This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case arises out of the respondent's punishment of Dr. Donald C. Austin ("Dr. Austin") for having testified as an expert witness for the plaintiff in a medical malpractice case.

Dr. Austin, a practicing neurosurgeon since 1963, was a member in good standing of the American Association of Neurological Surgeons ("AANS") for 33 years. In 1996, his membership was suspended because the AANS' Board of Directors determined that his testimony as an expert witness in a medical malpractice case violated the AANS' Code of Ethics and Expert Witness Guidelines.

In 1994, Dr. Austin testified as an expert witness for the plaintiff in the medical malpractice case of *Patricia Ayers v. Dr. Q. Michael Ditmore*, No. 93-4333-CV-C-66BA, in the United States District Court for the Western District of Missouri. The jury verdict in that case was for the defendant, Dr. Ditmore.

Following that trial, Dr. Ditmore filed charges against Dr. Austin with the AANS, contending that Dr. Austin's testimony violated the AANS' Expert Witness Guidelines. The AANS' Professional Conduct Committee found that Dr. Austin's testimony in the malpractice case was "unsupported by literature or logic,"[1] and recommended to the Board that Dr. Austin's membership be suspended. The Board adopted this recommendation.[2]

The effect of this suspension on Dr. Austin was dramatic and immediate. Prior to his suspension, Dr. Austin had earned an average of $220,000 per year from testifying as an expert witness in malpractice cases. Since the Association's actions, Dr. Austin has earned less than half that amount. In fact, several of the lawyers who used to hire Dr. Austin have willingly stated that their reason for no longer calling Dr. Austin was that he was sanctioned by the Association.

Dr. Austin sued in the United States District Court for the Northern District of Illinois, contending that his suspension by the AANS violated Illinois law, under which an association in which membership is an "important economic interest" may not discipline or discharge

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[1] Dr. Austin testified that the particular injury Ms. Ayers suffered could not have occurred without negligence. The AANS found Dr. Austin's testimony was unsupported by the medical literature, even though the defendant's expert in the malpractice trial conceded that the medical literature implied that Dr. Austin's testimony was correct. In the instant case, the only medical expert witness disclosed in pre-trial proceedings opined that Dr. Austin's testimony was correct.

[2] Dr. Austin has never contended that the procedures the AANS followed were unfair or inadequate.

a member without according the member due process, in violation of the association's bylaws, or contrary to public policy. *See, e.g., Van Daele v. Vinci*, 51 Ill. 2d 389, 393, 282 N.E.2d 728, 731 (1972) (overturning the expulsion of members of a independent grocers' cooperative because "there are too many factors indicating that the proceedings were in fact not good faith disciplinary hearings, but in reality, an attempt to silence and censure dissident members of the association.") The district court denied respondent's motion to dismiss for failure to state a claim, (*infra*, App. 24) but later granted respondent's motion for summary judgment. (*infra*, App. 15.)

When considering the AANS' Motion for Summary Judgment, the district court was presented with unrebutted evidence that the Expert Witness Guidelines under which Dr. Austin was punished were established by the AANS for the purpose of manipulating the manner in which the judicial system was handling medical malpractice cases. In 1976, the AANS' Professional Liability Committee studied what it termed an "epidemic" in the American medical malpractice liability system, the principal "symptom" of which was too many malpractice verdicts against neurosurgeons. According to the Professional Liability Company's report:

> the courts have decided that virtually all adverse medical outcomes or injuries resulting from medical treatment ought to be compensated. In essence, the critical issue which determines compensability is not negligence but a poor result.

Professional Liability Committee, American Association of Neurological Surgeons, *Proposed Standards for Testimony by Neurosurgeons Acting as Expert Witnesses*,

Journal of Neurosurgery, Aug. 1976, at 240 (hereafter "*Professional Liability Committee*"). This epidemic, the Professional Liability Committee's report concluded, was responsible for all manner of ill effects: skyrocketing malpractice insurance rates; neurosurgeons leaving the profession prematurely; extra tests and procedures ordered because of liability concerns, not because they were medically indicated; and the general demise of the doctor-patient relationship.

While the Professional Liability Committee's report acknowledged that neurosurgeons who performed badly were at least partly responsible for the problem, the solution it offered did not address this problem. Rather, it established expert witness rules and a procedure for enforcing those rules that was designed to appear even-handed and sensible, which in reality would only be applied to chill expert witness testimony on behalf of plaintiffs.

The Expert Witness Guidelines required all AANS members testifying as expert witnesses to:

1. Become familiar with all pertinent data of the particular matter at issue.
2. Review prior and current concepts related to the standard of neurosurgical practice in the matter at issue.
3. Not concern himself with the legal issues of the matter in question.
4. Identify as such personal opinions not generally accepted by other neurosurgeons.

Professional Liability Committee, p. 240. In addition, the AANS' Code of Ethics requires an AANS member testifying as an expert witness to "thoroughly prepare him-

self or herself with relative facts" so he or she can present the court with "accurate and documentable" opinions.

The Expert Witness Guidelines and Code of Ethics are not merely aspirational or precatory language; under the AANS Bylaws, a member's violation of either is cause for censure, suspension or expulsion.

However, the AANS Bylaws provide that *only* an AANS *member* can file charges. In other words, only doctors can complain about the testimony of other doctors. A patient who lost a viable malpractice claim because of dishonest expert testimony by a defendant's expert has no recourse. This procedural rule ensures that these seemingly evenhanded rules would never be applied to testimony for a doctor *defending* a malpractice claim. After all, what doctor-member would have the motive or inclination to bring charges against a doctor-member who testified *for* a doctor-member? The only people with a motive to bring charges will be doctors who were offended by what a plaintiff's expert had opined. In fact, the AANS' 1997 Annual Report highlights the fact that "The Professional Conduct Committee [the AANS Committee charged with enforcing the Expert Witness Guidelines] continues to provide a resource to *members* who may have been aggrieved by another member of the association in a tort proceeding."

Not surprisingly, all prosecutions under the Expert Witness Guidelines have been brought against a malpractice plaintiff's expert witness. No defendant's expert has ever been charged.

In granting the AANS' motion for summary judgment, the district court first concluded that Dr. Austin had presented sufficient evidence to show that membership

in the AANS significantly affected an important economic interest, causing him to lose hundreds of thousands of dollars in income. The fact that Dr. Austin was still able to earn a living was irrelevant, since a member of a private association "need not show that he will be rendered homeless or even driven to bankruptcy by its unfair action that caused him significant economic harm." (*infra*, App. 18.)

After finding that Dr. Austin had not been deprived of due process in his AANS disciplinary hearing (a point which Dr. Austin has never disputed), the district court determined that he had not shown that the AANS' decision was biased or in bad faith.

The district court did not reach the central issue in this case—whether the AANS' Expert Witness Guidelines violate public policy by discouraging members from testifying for plaintiffs in medical malpractice cases. Rather, it concluded that "there is no Illinois law giving a court power over the disciplinary decisions of a private association merely because they violate . . . public policy." (*infra*, App. 22.)

The court of appeals affirmed the district court. Writing for the court, Judge Posner correctly noted that Illinois law requires a court to overturn the disciplinary actions of a private association if they violate public policy. (*infra*, App. 3.) Yet Judge Posner decided that Dr. Austin's testimony was irresponsible, and that the AANS therefore did not violate public policy in punishing him for giving it.

Judge Posner held, without citing authority, that the AANS' Expert Witness Rules did not interfere with the judicial system, but actually furthered the cause of justice by exposing "shoddy" expert testimony.

> It is no answer that judges can be trusted to keep out such testimony. Judges are not experts in any field except law. Much escapes us, especially in a highly technical field, such as neurosurgery.[3]
>
> The *Daubert* rule, it is true, requires judges to screen proposed expert witnesses carefully to make sure that their testimony will be responsible. . . . Judges need the help of professional associations in screening experts.

(*infra*, App. 9-10.)

REASONS FOR GRANTING THE PETITION

This court should issue its writ of certiorari because the circuit court's decision: (a) overturns (without comment or analysis) hundreds of years of common law precedent preserving the integrity of the judicial system by protecting witnesses from the threat of retaliation for their court testimony; (b) sets a precedent that will dramatically tilt the playing field in medical malpractice cases in favor of defendants by creating a disciplinary system that will chill doctors' willingness to testify as expert witnesses for plaintiffs in medical malpractice cases; and (c) effectively overrules *Daubert v. Merrill Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993) by allowing professional associations, not trial judges, to estab-

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[3] Judge Posner's opinion belies the idea that judges need this help. Judge Posner conducted his own medical research, cited authorities in his opinion which neither side in this case cited or discussed, and concluded that Dr. Austin's testimony was "irresponsible."

lish rules that will govern the admissibility of expert testimony.

I. The Circuit Court Ignored Centuries of Common Law Precedent Protecting Witnesses from Punishment for their Testimony

As this court said in *Briscoe v. LaHue*, 460 U.S. 325, 332-34 (1983):

> In the words of one 19th-century court, in damages suits against witnesses, "the claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." *Calkins v. Sumner*, 13 Wis. 193, 197 (1860). A witness' apprehension of subsequent damages liability might induce two forms of self-censorship. First, witnesses might be reluctant to come forward to testify. See *Henderson v. Broomhead*, *supra*, at 578-579, 157 Eng. Rep., at 968. And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability. See *Barnes v. McCrate*, 32 Me. 442, 446-447 (1851). Even within the constraints of the witness' oath there may be various ways to give an account or to state an opinion. These alternatives may be more or less detailed and may differ in emphasis and certainty. A witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and

> undistorted evidence. See Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 Colum. L. Rev. 463, 470 (1909). But the truth-finding process is better served if the witness' testimony is submitted to "the crucible of the judicial process so that the factfinder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies." *Imbler v. Pachtman*, 424 U.S. 409, 440 (1976) (WHITE, J., concurring in judgment).

These 300 year old insights, which the common law has used to protect our judicial system from manipulation, are threatened by the result of this case.

For hundreds of years, the common law has protected the integrity of the judicial system by protecting witnesses from the fear or threat of retribution for their testimony. In addition to the absolute privilege that protects a witness from the threat of civil liability for his testimony, the law protects the integrity of the judicial system by making it both a high crime and a civil wrong to attempt to influence a witness. In Blackstone's day, "to endeavour to dissuade a witness from giving evidence" was a high misprision, one step below a capital crime. 4 William Blackstone, *Commentaries on the Law of England* *126. *See also* 18 U.S.C. § 1512, under which anyone who "knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person" to influence or prevent that person's testimony, is guilty of the crime of witness tampering; *and* 42 U.S.C. § 1985(2), making it a civil wrong for two or more people to "conspire to deter, by force, intimidation, or threat, any party or witness in

any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified."

In *Briscoe*, a case that clearly illustrates the importance of the policy of protecting witnesses from intimidation, the Court held that the absolute testimonial privilege protected even a police officer who had perjured himself to obtain a conviction. *Briscoe* did this not to encourage perjury (which itself interferes with the judicial system) but because allowing even one perjurer to face the threat of liability for his testimony would set a precedent that would deprive the judicial system of honest testimony, by making even honest witnesses testify guardedly with the fear of their own potential liability in mind.

Though *Briscoe* was concerned with civil liability, the ability of a system of "professional discipline" to chill admissible testimony is in many cases (such as this one) even greater than the threat of damages liability. Dr. Ditmore could not have sued Dr. Austin for damages. But, even if such a suit could have been brought, Dr. Ditmore's damages (and thus his threat to Dr. Austin) would have been minimal, since Dr. Ditmore won the malpractice trial. But, the AANS' "professional discipline" offered Dr. Ditmore a greater weapon for revenge; the sanction it imposed cost Dr. Austin hundreds of thousands of dollars in lost income. It makes no difference that Dr. Austin's loss did not go directly into Dr. Ditmore's pocket, or into the coffers of the AANS—the chilling effect on Dr. Austin and all other physicians who would consider testifying for a plaintiff is greater than the threat of civil liability. The issue to a potential

witness is the potential harm to the witness, not the amount of some other party's gain.

Many cases have recognized that the threat of professional discipline is as effective a deterrent to court testimony, and thus as pernicious to the impartial administration of justice, as the threat of civil liability. Chief among them is *Bernstein v. Alameda-Contra Costa Medical Association*, 293 P.2d 862 (Cal. App. 1956), which is almost identical to Dr. Austin's case. A doctor, expelled from his medical association based on the association's finding that his court testimony violated the association's Principles of Medical Ethics, sued for reinstatement. The court reversed the expulsion, stating:

> If parties and witnesses were subject to slander and libel actions for utterances made or filed in a judicial proceeding the administration of justice would be hampered and the judicial process throttled. The same policy should ban a medical association by-law which holds over each of the members the threat of expulsion if in his testimony (oral or written) before a court or other judicial body he 'disparages, by comment or insinuation,' another physician. . . . It is inconceivable that the law could tolerate the holding of such a sword of Damocles over any medical witness in any judicial proceeding.

Id. at 865.

In *Konrad v. DeLong*, 57 F.R.D. 123 (N.D. Ill. 1972), the defendant in a medical malpractice case filed charges against the plaintiff's expert with his county medical society, alleging that the expert's report was "'unethical' . . . 'containing many untruths and not medically sound.'" The court ordered the defendant to with-

draw the charges and permanently enjoined him from filing any charges based on the expert's testimony in that case, holding that:

> Even if [the plaintiff's expert] appears as a witness, the threat of retribution inherent in these circumstances will tend to affect his capacity to state his opinions in his testimony without fear or favor. Defendant's conduct, therefore, has the effect of intimidating the witness and obstructing justice.

Id. at 124.

In *Meyer v. McDonnell*, 392 A.2d 1129 (Md. Ct. App. 1978), the court strongly condemned the actions of a defendant in a medical malpractice case who attempted to intimidate the plaintiff's expert witness by threatening to disseminate his testimony to the local medical societies:

> Whatever merit the medical profession may have in its current outcry against malpractice suits, the remedy does not lie in polluting the streams of justice by tampering with witnesses.

Id. at 1130.

Similarly, in *L'Orange v. Medical Protective Company*, 394 F.2d 57 (6th Cir. 1968), the court held that a malpractice insurer could not cancel a doctor's policy (which it had the contractual right to do) because the doctor had testified as a plaintiff's expert:

> If the insurance industry can use the cancellation procedure to keep members of the medical profession from testifying as witnesses, malpractice litigation can be stifled.

Judge Posner had no doubt that the AANS' enforcement of its Expert Witness Rules would have a chilling effect on expert witness testimony.

> The *Daubert* rule, it is true, requires judges to screen proposed expert witnesses carefully to make sure that their testimony will be responsible. . . . Judges need the help of professional societies in screening experts. . . . More policing of expert witnessing is required, not less.

(*infra*, App. 10-11.) But, rather than condemn the AANS for interfering with the judiciary, Judge Posner praised the AANS and encouraged others to follow its example.

It is difficult to understand how Judge Posner saw the AANS disciplinary proceeding "helping" a court. It clearly cannot help the court in which the expert testimony is given since, under the AANS rules, the malpractice case must be over before a disciplinary proceeding can begin. It also cannot help the court to be denied the expert testimony of the doctors who will inevitably be intimidated. How many doctors will avoid testifying for plaintiffs once they realized that they run the risk of being sanctioned (and thus losing substantial income) if an unelected trio of doctors, guided by no precedent and reviewable by no court, disagrees with their opinion. Furthermore, as Justice Breyer observed, Rule 706 of the Federal Rules of Evidence gives the district court the power to obtain all the help it needs by appointing its own expert, in addition to those hired by the parties. *General Electric* at 149-150 (Breyer, J., concurring).

The circuit court's decision stands over 300 years of history on its head by not only failing to condemn the AANS' punishment of Dr. Austin for his expert testimony, but praising the AANS' actions and encouraging

others to follow its example. This Court should grant the Petition for Writ of Certiorari to exercise its supervisory authority to correct this radical departure from centuries of well-reasoned precedent.

II. The Circuit Court's Decision Will Quickly and Dramatically Tilt the Playing Field in Medical Malpractice Litigation in Favor of Defendants

By allowing the AANS to establish rules governing expert testimony by its members, and to punish a member for giving honest expert testimony which a trial judge, applying *Daubert* admitted in evidence, the circuit court effectively has given the AANS, and every other medical society, the power to control medical malpractice litigation against doctors. If the precedential effect of this case were somehow limited to the AANS, or to neurosurgeons, its societal effects might not be so extreme. However, there is every reason to expect that the AANS' success will be applied quickly to all physicians in all medical specialties. The boards of medical associations and their self-appointed "Professional Conduct Committees" (all of whom are unelected by and unaccountable to the general public), will accomplish what the democratically-elected legislatures have chosen not to—their own version of "tort reform"—by cutting off or altering plaintiffs' expert medical testimony at the source.

First, it appears that other medical societies, emboldened by the circuit court's opinion, will likely follow the AANS' lead in enacting rules governing expert testimony by members, and threatening violators with severe sanctions. Recently, the American Medical Association, which represents all medical professionals, proposed ex-

pert witness rules similar to the AANS'.[4] In addition, the American Medical Association, Illinois State Medical Society, and the American College of Surgeons, filed an *amicus curiae* brief supporting the AANS' position in the circuit court, suggesting that they, too, plan to implement similar rules.[5]

Second, without review by this Court, the circuit court's decision likely will have a wider geographic impact than the territory within the Seventh Circuit. Since many of the leading medical societies in the United States are based in Chicago, litigation challenging their expert witness rules will most likely take place in Chicago, where the circuit court's decision is binding precedent.[6] Furthermore, as a recent opinion by a

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[4] Michael Higgins, *Docking Doctors? AMA eyes discipline for physicians giving 'false' testimony*, ABA Journal, Sept. 1998, at 20.

[5] The American Academy of Orthopaedic Surgeons sought leave to file an *amicus* brief as well, but its request was denied as untimely.

[6] Even if litigation challenging the Expert Witness Guidelines of the AANS, or of another Chicago-based medical society, were commenced elsewhere, it likely would be transferred to the Northern District of Illinois pursuant to 28 U.S.C. § 1404(a). For example, in *Lustgarten v. American Association of Neurological Surgeons*, No. CV 201-55 (S.D. Ga. filed April 4, 2001), plaintiff, an AANS member against whom disciplinary charges had been filed for his testimony as a plaintiff's expert, sued to challenge the validity of the AANS' Expert Witness Guidelines. On June 7, 2001, the court granted the AANS' motion to transfer venue to the United States District Court for the Northern District of Illinois.

(continued...)

prominent appellate judge directly addressing the issue of whether a medical society may punish a member for giving honest, admissible expert testimony, the circuit court's decision is likely to be followed whenever this issue arises outside of the Seventh Circuit.

It requires no great insight to see—as did the courts in *Bernstein*, *Konrad*, *Meyer* and *L'Orange*, *supra*—that allowing medical societies free reign to punish members for testifying as plaintiff's experts will give the societies total control over medical malpractice litigation, since it is impossible for a plaintiff to prove malpractice without expert testimony.[7] Even before this case it had been difficult to find a physician willing to testify as a plaintiff's expert. For decades, the plaintiffs' bar has railed against the "conspiracy of silence"—the near-universal refusal of members of the medical profession to accuse a fellow doctor of negligence. Even outside of the legal arena, the medical profession has been notoriously lax at self-policing. Atul Gawande, *When Good Doctors Go Bad*, New Yorker, Aug. 7, 2000, at 60.

> There's an official line about how the medical profession is supposed to deal with [bad doctors]: colleagues are expected to join forces promptly to remove them from practice and report them to the medical-licensing authorities, who, in turn, are supposed to discipline them or expel them

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[6] (...continued)
Lustgarten v. American Association of Neurological Surgeons, No. CV 201-55 (S.D. Ga. June 7, 2001).

[7] In some states, such as Illinois, a plaintiff cannot even *file* a malpractice complaint without a written expert opinion that the defendant was guilty of malpractice. 735 ILCS 5/2-622.

> from the profession. It hardly ever happens that way. Marilynn Rosenthal, a sociologist at the University of Michigan . . . gathered data on what happened in more than two hundred specific cases . . . and nearly everywhere she looked she found the same thing. It was a matter of months, even years, before colleagues took effective action against a bad doctor, however dangerous his or her conduct might have been.

Id. at 63.

The AANS' rules give the medical profession a tailor-made enforcement mechanism for its conspiracy of silence. Many more physicians will be deterred from testifying as plaintiffs' experts by the threat of severe economic sanctions. Those few doctors who are still willing to testify will be "brought up on charges," having their testimony labeled "irresponsible," and, like Dr. Austin, vulnerable to the prospect of being prevented from again being considered as expert witnesses.

III. The Circuit Court Virtually Overruled *Daubert*

In *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co., Ltd. v. Carmichael*, No. 526 U.S. 137 (1999), this Court has repeatedly reaffirmed that it is the role of the trial judge—subject only to review under the most deferential abuse of discretion standard—to determine what expert testimony is admissible in evidence.

By allowing the AANS to establish its own standards, apply those standards only to testimony which a trial court, applying *Daubert*, already has held admissible,

and mete out its own punishment for admissible testimony that it determines violates those standards, and by encouraging other medical societies to do likewise, the circuit court has effectively overruled *Daubert*.

In *Daubert*, the Court held that Rule 702 of the Federal Rules of Evidence supplanted the *Frye* rule, under which expert testimony was inadmissible unless the basis of the testimony was "sufficiently established to have gained general acceptance in the particular field to which it belongs." *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). This Court held that "a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion testimony."' . . . [*Frye*'s] austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials." *Id.* at 588-89. Instead, *Daubert* held that Rule 702 requires the trial judge to determine—essentially on a case-by-case basis for each proffer of expert testimony—whether "the reasoning or methodology underlying the testimony is scientifically valid, and . . . whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93.

The AANS' standards are inconsistent with *Daubert*. The AANS' Code of Ethics prohibits its members from rendering any expert opinion that is not both accurate and "documentable", that is, "supported by peer-reviewed literature." If an opinion is not found in the medical literature, no AANS member may express it in court.

However, *Daubert* forbids such a blanket rule. This Court warned that an opinion may not be published in

the relevant literature for any number of reasons that have nothing to do with its scientific validity—it may be too new, too esoteric, or of so limited interest to the scientific community that nobody has bothered to write on that particular issue. *Id.* at 593-94. Under *Daubert*, the presence or absence of published literature supporting an expert's opinion is but one factor that the trial court may consider (or, following *Kumho Tire*, may choose not to consider) in deciding whether to admit the testimony. But, if the AANS' disciplinary system is allowed to continue, it will be the *sine qua non* of admissibility for plaintiffs' experts. Defendants' experts, on the other hand, who are not exposed to AANS discipline, will be free to testify under the broad rules of *Daubert*. Judge Posner unwittingly allowed the AANS to re-establish "general acceptance" as the standard for the admissibility of expert testimony.

The Court rejected the argument that "abandonment of 'general acceptance' as the exclusive requirement for admission will result in a 'free-for-all' in which befuddled juries are confounded by absurd and irrational pseudo-scientific assertions." In the first instance, *Daubert* requires trial judges to make a preliminary assessment of the scientific validity of any proffered expert testimony—a task which the Court was "confident" federal judges were capable to perform. The Court also noted, in language reminiscent of Mr. Justice Stevens in *Briscoe*:

> Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. Additionally, in the event the trial court concludes that the scintilla of evidence presented supporting a proposition is insufficient

> to allow a reasonable juror to conclude that the proposition more likely than not is true, the court remains free to direct a judgment, and likewise to grant summary judgment.

Id. at 596 (internal citations omitted).

Two later cases, in both of which the Court affirmed the district court's decision on the admissibility of proposed expert testimony, highlight the autonomy which *Daubert* confers on the district court performing its gatekeeping function. In *General Electric*, the Court held that a district court's decision to admit or exclude expert testimony is reviewable only under the abuse of discretion standard. In *Kumho Tire*, the Court held that: (a) *Daubert* applies to all expert testimony, not merely "scientific" testimony; and (b) the abuse of discretion standard applies "as much to the trial court's decisions about how to determine reliability [of proposed expert testimony] as to its ultimate conclusion [whether to admit or exclude the testimony.]" *Id.* at 152.

By allowing private associations to punish a witness for giving expert testimony that a court, applying *Daubert*, held was sufficiently reliable to help the trier of fact, Judge Posner invites associations to impose their own, more restrictive, standards for expert testimony. The mere threat of "professional discipline" will cause many witnesses to conform to the more restrictive standard in order to avoid punishment, thus depriving the court system of testimony it would consider helpful to the trier of fact. This is especially heinous since the AANS' rules will only be applied against plaintiff's experts.

CONCLUSION

For the foregoing reasons, this Court should issue its writ of certiorari to review the judgment of the Seventh Circuit.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-4028

DONALD C. AUSTIN,

Plaintiff-Appellant,

v.

AMERICAN ASSOCIATION OF
NEUROLOGICAL SURGEONS,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 98 C 7685—**Elaine E. Bucklo**, *Judge*.

ARGUED APRIL 9, 2001—DECIDED JUNE 12, 2001

Before POSNER, EVANS, and WILLIAMS, *Circuit Judges*.

POSNER, *Circuit Judge*. Donald C. Austin, a neurosurgeon, was suspended for six months by the American Association of Neurological Surgeons, a voluntary association incorporated under Illinois law as a not-for-profit corporation, to which he belonged (he has since resigned). He brought this suit against the Association claiming that he had been suspended in "revenge" for having testified as an expert witness for the plaintiff in a medical malpractice suit brought against another member of the Association, a Dr.

Ditmore. Austin argues that the suspension violated Illinois law (federal jurisdiction is based on the parties' being citizens of different states) and seeks damages measured by the decline in his expert-witness income as a consequence of the suspension. He also seeks an injunction expunging the record of the suspension, but he does not seek reinstatement to membership.

Ordinarily a dispute between a voluntary association and one of its members is governed by the law of contracts, the parties' contractual obligations being defined by the charter, bylaws, and any other rules or regulations of the association that are intended to create legally enforceable obligations. See, e.g., *Head v. Lutheran General Hospital*, 516 N.E.2d 921, 927 (Ill. App. 1987); *Perkaus v. Chicago Catholic High School Athletic League*, 488 N.E.2d 623, 627 (Ill. App. 1986); *Dawkins v. Walker*, No. 1991712, 2001 WL 259285, at *5 (Ala. March 16, 2001); *Robinson v. Kansas State High School Activities Ass'n, Inc.*, 917 P.2d 836, 844 (Kan. 1996); 2 Marilyn E. Phelan, *Nonprofit Enterprises: Corporations, Trusts, and Associations* § 14:03, p. 14-12 (2000). Austin does not argue that in suspending him the Association was violating any of its contractual obligations to him. But recognizing that membership in good standing in a professional association may be essential to a professional's livelihood, Illinois like other states has conferred additional legal rights on members of voluntary associations (not limited to professional associations). A member who can show that the association's action of which he complains substantially impaired an "important economic interest" of his can base suit on procedural irregularities (denial of "due process") or bad faith as well as on the usual contractual grounds. *Van Daele v. Vinci*, 282 N.E.2d 728, 731-32 (Ill. 1972); *National Assoc. of Sporting Goods Wholesalers, Inc. v. F.T.L. Marketing Corp.*, 779 F.2d 1281, 1285 (7th Cir. 1985) (applying Illinois law); *Jacobson v. New York Racing Ass'n*, 305 N.E.2d 765, 768 (N.Y.

1973); *Falcone v. Middlesex County Medical Society*, 170 A.2d 791, 796-97 (N.J. 1961); *Freeman v. Sports Car Club of America, Inc.*, 51 F.3d 1358, 1363 (7th Cir. 1995) (applying Indiana law); *NAACP v. Golding*, 679 A.2d 554, 562 (Md. App. 1996); 2 Phelan, *supra*, § 14:03, pp. 14-10 to 14-11. The cases add to the list of grounds for such a suit violation of the association's charter or bylaws and contravention of public policy, but the former ground (violation of charter or bylaws) is just another way of assimilating voluntary-association law to contract law (see, besides the cases cited earlier, *Van Valkenburg v. Liberty Lodge*, 619 N.W.2d 604, 610 (Neb. App. 2000), and *Employees' Benefit Ass'n v. Grissett*, 732 So. 2d 968, 975 (Ala. 1998))—and the latter too, since illegality is a conventional basis in contract law for rescinding a contract, see, e.g., E. Allan Farnsworth, *Contracts* §§ 5.1, 5.8 (3d ed. 1999), including a bylaw or charter provision pursuant to which a member of a voluntary association has been expelled. See, e.g., *Crandall v. North Dakota High School Activities Ass'n*, 261 N.W.2d 921, 925-26 (N.D. 1978). What "bad faith" adds to the litany of grounds is obscure; it can be regarded either as a component of the due process analysis, analogous to the requirement of an impartial tribunal in an ordinary due process case, or as an implied term in the contract between the association and its members.

There were no procedural irregularities here—Austin received notice and a full hearing (with counsel) before a panel of Association members not implicated in his dispute with Ditmore. The complaint is rather that the Association acted in bad faith because it never disciplines members who testify on behalf of malpractice defendants as distinct from malpractice plaintiffs and that it is against public policy for a professional association to discipline a member on the basis of trial testimony unless the testimony was intentionally false.

Austin had been retained to testify on behalf of a woman whose recurrent laryngeal nerve was permanently damaged in the course of an anterior cervical fusion performed by Dr. Ditmore, resulting in a paralyzed vocal cord, difficulty in swallowing, and shortness of breath that ultimately required her to undergo a tracheostomy. An anterior cervical fusion is an operation to repair a herniated spinal disc at the back of the neck. The operation is called "anterior" because the surgeon cuts into the spine from the front, that is, through the neck, being careful to push aside ("retract," in medical lingo) the tissues in front of the spine. According to the testimony that Austin was permitted to give at trial, he believes and "the majority of neurosurgeons" would concur that the plaintiff could not have suffered a permanent injury to her recurrent laryngeal nerve unless Dr. Ditmore had been careless, because she had no anatomical abnormality that might have enabled such an injury to result without negligence on the surgeon's part—though in the disciplinary hearing it emerged that, because the recurrent laryngeal nerve is difficult to see, and often is not seen during the operation, it may be impossible to determine whether the particular patient's nerve is unusually susceptible to injury. Austin testified that Ditmore must have rushed the operation (though there was no other evidence of that) and as a result retracted the tissues adjacent to the recurrent laryngeal nerve too roughly. As Ditmore pointed out at the hearing, however, Austin could hardly be considered an expert on anterior cervical fusion, having performed only 25 to 30 of them in more than 30 years in practice, although he had performed a large number of other cervical operations. Ditmore in contrast had performed 700 anterior cervical fusions—with exactly one case of permanent damage to a patient's recurrent laryngeal nerve, namely the case of the patient who had sued him.

Dr. Austin claimed at the hearing that he had based his opinion on an article by a Dr. Ralph Cloward, described by Austin as the "father" of anterior cervical fusion, which had concluded that "serious complications are avoidable and can be prevented by the surgeon adhering strictly to the surgical technique described for" an anterior cervical fusion; and on another article, which Austin did not date, or identify other than by the last name of the author, Watkins, which states that "the key to prevention of traction injuries to the [recurrent laryngeal] nerve is not to retract vigorously into the soft tissues." Although neither side's lawyer appears to have been aware of the fact, both articles are reprinted in full in the appellate record—in fact twice. The citations are Ralph B. Cloward, "Complications of Anterior Cervical Disc Operation and Their Treatment," 69 *Surgery* 175, 182 (1971); Robert G. Watkins, "Cervical, Thoracic, and Lumbar Complications—Anterior Approach," in *Complications of Spine Surgery* 211, 221 (Steven R. Garfin ed. 1989).

Neither article supports Austin's testimony. Cloward was making a general statement of reassurance about the avoidability of serious complications of his pet operation, not anything specifically to do with the risk of permanent damage to the recurrent laryngeal nerve. Watkins never suggested that all traction injuries to the recurrent laryngeal nerve could be prevented by gentle retraction. Austin admitted that he hadn't discussed the matter with any other medical professionals. Expert evidence contrary to Austin's was given and the jury returned a verdict for Ditmore. That was in 1995. Ditmore promptly complained to the Association and Austin was suspended in 1997 following a hearing at which he and Ditmore testified, the latter to the effect that Austin had no basis for testifying that most neurosurgeons agreed with his view. This suit followed quickly on the heels of the suspension, and the

district court granted summary judgment in favor of the Association.

Oddly, apart from Cloward's article, and the Watkins article of unknown provenance (unknown to the lawyers, that is), no literature on anterior cervical fusion or injuries to the recurrent laryngeal nerve was presented either to the Association's hearing board or to the district court, although some additional literature had been presented at the malpractice trial and there is an abundance of up-to-date relevant literature easily retrievable from the World Wide Web. There we discover in a cursory search that permanent damage to the recurrent laryngeal nerve is a known though fortunately rare complication of anterior cervical fusion (a 1982 study found only 52 cases of paralysis to the recurrent laryngeal nerve in 70,000 such operations—.07 percent) against which the patient should be warned. See, e.g., informeddecision.com, http://www.informeddecision.com/options/cervical/crvfusna.htm; wvneuro.com, http://www.wvneuro.com/anterior_cervical_fusion_page_1_.htm; headpain.com, http://www.headpain.com/p_acf.htm; neurosurgery.org, http://www.neurosurgery.org/health/patient/detail.asp?DisorderID=36. Asked on cross-examination at the malpractice trial to explain why the medical literature did not confirm his view of what a majority of neurosurgeons think, Austin responded lamely that the "medico-legal atmosphere that we're in these days" had deterred the surgical community from acknowledging that this particular complication of anterior cervical fusion could occur only through the surgeon's negligence.

But that is an aside, as we do not understand Austin to be contending that the record is inadequate to support an inference that his testimony was indeed irresponsible. Since neither article on which he relies (for, just as in the disci-

plinary hearing and in the district court, he cites no other literature in this court) states that permanent injury to the recurrent laryngeal nerve of a patient with a normal neck *never* occurs without negligence on the part of the surgeon, and since his position if accepted would, by making the surgeon an insurer against any serious mishaps in an anterior cervical fusion, make the operation exceptionally risky in a financial or liability sense for the surgeon, and since Austin plainly had not attempted to sound the opinion of his profession to determine whether a majority of the nation's several thousand neurosurgeons agree with his unorthodox view, there is little doubt that his testimony was irresponsible and that it violated a number of sensible-seeming provisions of the Association's ethical code. These include provisions requiring that a member appearing as an expert witness should testify "prudently," must "identify as such, personal opinions not generally accepted by other neurosurgeons," and should "provide the court with accurate and documentable opinions on the matters at hand."

The dismissal of Austin's suit was unquestionably correct. To begin with, he failed to show that an "important economic interest," as the Illinois cases interpret the term, is at stake. Membership in the American Association of Neurological Surgeons is not a precondition to the practice of neurosurgery. The AANS is not even the only association of such surgeons, though we were told without contradiction that it is the premier one. Austin continues to practice neurosurgery notwithstanding his suspension and subsequent voluntary resignation from the Association, and he doesn't even seek reinstatement—only damages and expungement of the record of his disciplinary suspension. Indeed, despite the suspension, he continues to testify extensively as an expert witness in medical malpractice cases. True, his income from testifying has fallen to 35 percent of

what it was before the suspension, when it was more than $220,000 a year. Austin's brief describes this drop in income as "disastrous" and "catastrophic," but that is a hyperbolic characterization. Thirty-five percent of $220,000 is a healthy $77,000—and this is merely as it were Dr. Austin's moonlighting income, income from a sideline to his primary profession, which is that of a neurosurgeon, not an expert witness (he does not claim the dubious title of "professional expert witness"). That is not the kind of professional body blow that the cases have in mind when they speak of an "important economic interest" jeopardized by the action of a voluntary association. Compare *Van Daele v. Vinci*, *supra*, 282 N.E.2d at 731-32, where expulsion from an association of independent retail grocers placed the plaintiff grocer at a potentially catastrophic competitive disadvantage by denying him access to the volume discounts that the association obtained from its suppliers. At the very least, the association's action must jeopardize the principal source of the professional's livelihood, and not a mere sideline. Compare *Falcone v. Middlesex County Medical Society*, *supra*, 170 A.2d at 794, where the refusal of a local medical society to admit a duly licensed physician to membership prevented him as a practical matter from practicing as a surgeon and obstetrician by denying him access to local hospitals. Where membership is optional, expulsion (or suspension, or denial of admission) is not deemed the invasion of an important economic interest. *Treister v. American Academy of Orthopaedic Surgeons*, 396 N.E.2d 1225, 1231-32 (Ill. App. 1979); *Finn v. Beverly Country Club*, 683 N.E.2d 1191, 1193 (Ill. App. 1997); *Lee v. Snyder*, 673 N.E.2d 1136, 1139 (Ill. App. 1996).

But there is much more that is wrong with this suit. There is no basis for Austin's claim that the Association entertains only complaints against members who testify on behalf of malpractice plaintiffs. What is true is that to date all complaints (but there have been very few) have been against

such members; but the reason is at once obvious and innocent. If a member of the Association is sued for malpractice and another member gives testimony for the plaintiff that the defendant believes is irresponsible, it is natural for the defendant to complain to the Association; a fellow member has irresponsibly labeled him negligent. If a member of the Association who testifies for a plaintiff happens to believe that the defendant's expert witness was irresponsible, he is much less likely to complain, because that expert (and fellow member of the Association) has not accused *him* of negligence or harmed him in his practice or forced him to stand trial or gotten him into trouble with his liability insurer. The asymmetry that Austin points to as evidence of bad faith is thus no evidence of bad faith at all; and he has no other evidence of bad faith.

In support of his further claim that it is against public policy for a professional association to sanction one of its members for irresponsible (as distinct from knowingly false) testimony, Austin argues that the threat of such sanctions is a deterrent to the giving of expert evidence and so a disservice to, indeed an interference with, the cause of civil justice. We disagree and think the courts of Illinois would likewise; this kind of professional self-regulation rather furthers than impedes the cause of justice. By becoming a member of the prestigious American Association of Neurological Surgeons, a fact he did not neglect to mention in his testimony in the malpractice suit against Ditmore, Austin boosted his credibility as an expert witness. The Association had an interest—the community at large had an interest—in Austin's not being able to use his membership to dazzle judges and juries and deflect the close and skeptical scrutiny that shoddy testimony deserves. It is no answer that judges can be trusted to keep out such testimony. Judges are not experts in any field except law. Much escapes us, especially in a highly technical field, such as

neurosurgery. When a member of a prestigious professional association makes representations not on their face absurd, such as that a majority of neurosurgeons believe that a particular type of mishap is invariably the result of surgical negligence, the judge may have no basis for questioning the belief, even if the defendant's expert testifies to the contrary.

The *Daubert* rule, it is true, requires judges to screen proposed expert witnesses carefully to make sure that their testimony will be responsible, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318-19 (7th Cir. 1996); *Wilson v. City of Chicago*, 6 F.3d 1233, 1238-39 (7th Cir. 1993), but only federal courts are bound by the rule (though this is not a limitation particularly relevant here, since the malpractice suit that Austin testified in was tried in a federal district court); and it is not airtight. (See *Ambrosini v. Labarraque*, 101 F.3d 129, 133-34 (D.C. Cir. 1996), discussing the limited nature of the judge's gatekeeping role under *Daubert*.) Judges need the help of professional associations in screening experts. The American Association of Neurological Surgeons knows a great deal more about anterior cervical fusion than any judge, and if the Association finds in a proceeding that comports with the basic requirements of due process of law that a member of the Association gave irresponsible expert testimony, that is a datum that judges, jurors, and lawyers are entitled to weigh heavily. One has only to read the transcript of the disciplinary hearing, and particularly the questions that the members of the hearing panel, all neurosurgeons of course, directed to Dr. Austin, to realize how far the ordinary voir dire of an expert can fall short. The market response to Austin's suspension has not been irrational.

We doubt that he would embrace the converse of the rule for which he contends, and concede that if a judge rules

that a proposed expert's testimony is inadmissible because irresponsible, that ruling is a proper predicate for professional discipline. Fair enough; a judge is not a surgical expert and his ruling on the admissibility of an expert's witness may be in error. But by the same token the judge's ruling that expert testimony is admissible should not be taken as conclusive evidence that it is responsible testimony.

There is a great deal of skepticism about expert evidence. It is well known that expert witnesses are often paid very handsome fees, and common sense suggests that a financial stake can influence an expert's testimony, especially when it is technical and esoteric and hence difficult to refute in terms intelligible to judges and jurors. More policing of expert witnessing is required, not less. Not that professional self-regulation is wholly trustworthy. Professional associations have their own axes to grind. No doubt most members of the AANS are hostile to malpractice litigation, and this may impart a subtle bias to its evaluation of members' complaints, though there is nothing in the transcript of the hearing before the Association's hearing panel to justify such an inference. But even in cases such as this, where the absence of an "important economic interest" deprives the disciplined member of the special protections of Illinois voluntary-association law, he has recourse to defamation law should the discipline falsely impugn his professional competence, see, e.g., *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1015 (3d Cir. 1994); *Fitzgerald v. Minnesota Chiropractic Ass'n, Inc.*, 294 N.W.2d 269 (Minn. 1980), including his competence to testify responsibly on issues within the scope of his professional expertise. If Austin was wronged by the Association, he had remedies, but not under the Illinois law of voluntary associations.

We note finally that there is a strong national interest, which we doubt not that Illinois would embrace, in identi-

fying and sanctioning poor-quality physicians and thereby improving the quality of health care. Although Dr. Austin did not treat the malpractice plaintiff for whom he testified, his testimony at her trial was a type of medical service and if the quality of his testimony reflected the quality of his medical judgment, he is probably a poor physician. His discipline by the Association therefore served an important public policy exemplified by the federal Health Care Quality Improvement Act, 42 U.S.C. §§ 11101 *et seq.*, which encourages hospitals to conduct professional review of its staff members and report malpractice to a federal database. As an inducement to the vigorous performance of this reporting function, the Act immunizes hospitals from liability for disciplinary actions they take against staff physicians, provided only that the hospital is acting in good faith. See 42 U.S.C. §§ 11101, 11111, 11112; *Brader v. Allegheny General Hospital*, 167 F.3d 832, 839-41 (3d Cir. 1999); *Wayne v. Genesis Medical Center*, 140 F.3d 1145, 1148 (8th Cir. 1998) (per curiam); *Imperial v. Suburban Hospital Ass'n, Inc.*, 37 F.3d 1026, 1028 (4th Cir. 1994).

As a final detail, irrelevant on the view we take of this case but possibly relevant to future cases, we note the merited difficulty of proof of damages in a case such as this. Austin cannot obtain damages for any injury to his professional reputation and resulting fee-earning opportunities as a result of the *accurate* revelation of his having given irresponsible testimony under oath in a suit for medical malpractice. That injury is the direct consequence of socially valuable information; that it might have been precipitated by an unlawful act (though we think not) would not make the act a "cause" of the injury in a sense that the law recognizes. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), establishes the principle in the antitrust context, but it is equally apropos the common law tort context. A competitor of a merged firm claimed to be injured

because the merger, though unlawful, had intensified lawful competition with it. The Court held that the injury this firm had sustained was not the kind of injury that antitrust law tries to prevent—on the contrary, lawful competition is an "injury" (to competitors hurt by competition) that the antitrust laws seek to promote. To put this differently, the merger had both good and bad effects, and the good effects should not be punished by an award of damages. It is the same here. Tort law does not seek to prevent injuries arising from the dissemination of truthful information that rationally induces withdrawal of patronage from the person whom the information concerns. So Austin, had he proved a wrong, would have had to partition the injury resulting from it between the part due to the revelation of truthful information and the part due to the disciplinary suspension itself. Compare the many cases which hold that the victim of defamation can obtain damages only for any *incremental* harm done to his reputation by the defamation—if his reputation has already been destroyed by truthful information, he has no remedy. E.g., *McIlvain v. Jacobs*, 794 S.W.2d 14, 15-16 (Tex. 1990); *Desnick v. American Broadcasting Cos.*, 44 F.3d 1345, 1350 (7th Cir. 1995); *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1228 (7th Cir. 1993); *Re v. Gannett Co.*, 480 A.2d 662, 669 (Del. Super. 1984), affirmed, 496 A.2d 553 (Del. 1985).

AFFIRMED.

WILLIAMS, *Circuit Judge*, concurring in part and in the judgment. I join the majority opinion only insofar as it holds that Dr. Austin has not demonstrated an "important economic interest" in membership in the American Association of Neurological Surgeons. Without an important eco-

nomic interest, Dr. Austin may not challenge in the courts the Association's private, internal procedure under Illinois law. *Van Daele v. Vinci*, 282 N.E.2d 728, 731 (Ill. 1972). As that holding is dispositive of this case, in my view we need not proceed to predict whether Illinois would find the Association's procedure a violation of public policy. *Cf. Disher v. Info. Res., Inc.*, 873 F.2d 136, 141 (7th Cir. 1989) ("We are reluctant to opine unnecessarily on questions of state law."); *Graphic Sales, Inc. v. Sperry Univac Div., Sperry Corp.*, 824 F.2d 576, 581 (7th Cir. 1987) ("As a federal court whose jurisdiction is based on diversity of citizenship, we are particularly hesitant to decide unsettled questions of state law unnecessarily.").

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Clerk of the United States Court of Appeals for the Seventh Circuit

120 F.Supp.2d 1151
(Cite as: 120 F.Supp.2d 1151)

United States District Court,
N.D. Illinois,
Eastern Division.

Dr. Donald C. AUSTIN, Plaintiff,
v.
AMERICAN ASSOCIATION OF NEUROLOGICAL SURGEONS (founded in 1931 as the Harvey Cushing Society), Defendant.

No. 98 C 7685.

Oct. 20, 2000.

MEMORANDUM OPINION AND ORDER

BUCKLO, District Judge.

From 1963 to 1996, Dr. Donald C. Austin, a citizen of Michigan, was a member of the American Association of Neurological Surgeons (the "AANS"), a professional association incorporated under Illinois law and with its principal place of business in this state. In 1996, the AANS suspended Dr. Austin for violating its Code of Ethics and Expert Witness Guidelines. When charged in 1995, he submitted a letter of resignation. However, rather than accepting the resignation at that time, the AANS decided to proceed with disciplinary charges that Dr. Austin provided "entirely false" testimony in a medical malpractice lawsuit against another physician, Dr. Michael Ditmore. Dr. Austin was represented by counsel throughout the proceedings, which resulted, in 1996, in

a six-month suspension from membership in the AANS. In 1997, Dr. Austin appealed twice and lost. The Board then accepted his resignation. He never applied for re-admission.

In 1998, Dr. Austin filed this diversity lawsuit, to be decided under Illinois law, alleging that the AANS had violated his due process rights secured to him by state law, essentially because he acted in favor of medical malpractice plaintiffs and refused to circle the wagons and justify professional incompetence by other doctors. He alleged that the AANS's unjustified and unfair actions had cost him a lot of money in expert witness fees, because the disciplinary charges made him less attractive as an expert witness. Who, after all, wants an expert who has to acknowledge that he was suspended from his professional association for ethical violations he was found to have committed as an expert witness? The AANS now moves for summary judgment, and I grant the motion.

I.

[1] As a court sitting in diversity, I "attempt to predict how the [Illinois] Supreme Court would decide the issues presented here." *Lexington Ins. Co. v. Rugg & Knopp*, 165 F.3d 1087, 1090 (7th Cir.1999). In Illinois, voluntary associations have great discretion in conducting their internal affairs, and their conduct is "subject to judicial review only when they fail to exercise power consistently with their own internal rules or when their conduct violates the fundamental right of a member to a fair hearing." *Finn v. Beverly Country Club*, 289 Ill.App.3d 565, 225 Ill.Dec. 528, 683 N.E.2d 1191, 1193 (1997). If there has been no "mistake, fraud, collusion or arbitrari-

ness," *id.*, the Illinois Supreme Court has endorsed judicial interference only when a substantial property, contract, or other economic right that implicates due process is at stake. *See Van Daele v. Vinci*, 51 Ill.2d 389, 282 N.E.2d 728 (1972). As that court stated, "[a]lthough the courts in this State have traditionally been reluctant to interfere in the internal operations of associations, [a] strong possibility that an important economic interest of the plaintiffs was affected by an improper administrative proceeding gives the court power and the duty to act." *Id.* at 731. Illinois courts will only review the decisions of private associations when *1153 "the plaintiffs possess[ ] an important economic interest based on the individual's opportunity for . . . pursuing their livelihood which was affected by improper administrative procedures." *Knapp v. Northwestern Univ.*, No. 95 C 6454, 1996 WL 495559, at *1 (N.D.Ill. Aug. 28, 1996) (unpublished opinion of Zagel, J.) (*citing Van Daele*, 282 N.E.2d at 731; *Virgin v. Amer. Coll. of Surgeons*, 42 Ill.App.2d 352, 192 N.E.2d 414, 422-23 (1963); *Duby v. Amer. Coll. of Surgeons*, 468 F.2d 364, 368-69 (7th Cir.1972)). In these cases, Judge Zagel explained:

> [T]he plaintiffs suffered direct and real economic harm to their ability to earn a living as a result of their expulsion from the professional associations. As a result, the courts held they would annul an expulsion from a voluntary association when the expulsion is not in accordance with the constitution and bylaws of the association, is influenced by bias, prejudice or lacking in good faith, or contrary to rudimentary due process or natural justice.

Id. The key points, then, are that under Illinois law, a court may review the internal procedures of a voluntary association with respect to its members only when: (1)

the operation of the association significantly harms an important economic interest of the plaintiff belonging to the association when it acted; (2) the association (a) failed to act in accord with its own constitution and by-laws; (b) was influenced by bias, prejudice, or lacking in good faith, or (c) violated due process. This power exists, furthermore (3), only when the association has "a [public] purpose which exceeds merely that of a social organization and its endeavor to benefit from various State and Federal laws." *Van Daele*, 282 N.E.2d at 732.

II.

A.

The AANS does not dispute that it has a public purpose exceeding that of a mere social organization, and Dr. Austin does not argue that the association failed to follow its own rules, but rather challenges the fairness and application of those rules to his case. Dr. Austin has brought forward sufficient evidence that the Association's actions have significantly affected his economic interests by causing him to lose many hundreds of thousands of dollars in expert witness fees. The AANS contends that Dr. Austin has not established that membership in the association is an "economic necessity," but in Illinois, the standard is whether the association's actions significantly affected "an important economic interest." *Van Daele*, 282 N.E.2d at 731. To recover under Illinois law a member of a private association need not show that he will be rendered homeless or even driven to bankruptcy by its unfair action that caused him significant economic harm.

B.

[2] The question then comes down to whether the AANS deprived Dr. Austin of due process or treated him with bad faith in subjecting him to discipline. In Illinois, "[t]he term 'due process of law' is an ever-maturing concept that evolves from our history and precedent and is not amenable to precise definition." *People v. Washington*, 171 Ill.2d 475, 216 Ill.Dec. 773, 665 N.E.2d 1330, 1338 (1996). However, in the context of the fairness of proceedings, "[t]he essence of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Petersen v. Chicago Plan Commission*, 302 Ill.App.3d 461, 236 Ill.Dec. 305, 707 N.E.2d 150, 154 (1998). The Illinois Supreme Court has acknowledged that a voluntary association need not strictly adhere to "judicial standards of due process," *Van Daele*, 282 N.E.2d at 732, but must provide "one subjected to such disciplinary actions . . . a hearing before a fair and impartial tribunal." *Id.* Due process is "satisfied by a form of procedure that is suitable and proper to the nature of the determination to be made and conforms to fundamental principles of justice." *1154 *Petersen*, 236 Ill.Dec. 305, 707 N.E.2d at 154 (administrative context).

[3] The AANS proceedings in Dr. Austin's case more than met these standards. He does not dispute that he received written notice of the charges, with prior disclosure of all documents considered in the case, or that he was allowed to present his arguments before an AANS Committee and to cross-examine witnesses, or that he received two levels of appeal and was allowed to have representation by counsel at all stages of the proceedings. Unless the whole thing was a sham conducted in bad faith, a kangaroo court run with the cynical purpose

of harming him while pretending to be fair, Dr. Austin received as much due process as anyone might hope for.

C.

[4] Dr. Austin does not actually argue directly that the AANS acted in bad faith, just that it was wrong. However, on a summary judgment motion I must "construe the evidence in the light most favorable to the nonmoving party and draw all justifiable inferences in favor of that party." *Target Market Publishing, Inc. v. ADVO, Inc.*, 136 F.3d 1139, 1141 (7th Cir.1998). Now a tribunal is entitled to make a factually wrong decision, but if the AANS's decisions were so utterly wrong and completely unsupported that no fair and rational person viewing the evidence could have come to that conclusion, that might raise a supportable inference that the AANS acted in bad faith. Nothing in Illinois law suggests that a court may review the factual determinations of a disciplinary committee of a private association, as opposed to the fundamental fairness of its proceedings, but if the factual baselessness of the determination was so great as to raise doubts about fundamental fairness of the process that produced it, then I may review that process under the line of cases I am considering here.

[5] Unfortunately for Dr. Austin, his argument does not show that the AANS's determinations were so devoid of support that a rational jury might conclude it acted in bad faith. The issue was whether he had been justified in testifying that Dr. Ditmore had committed medical malpractice in performing a sort of neck surgery called an "anterior cervical fusion" when a patient of his (the plaintiff in that malpractice case) suffered permanent, total loss of function of the recurrent laryngeal nerve,

which controls the vocal cords. The AANS held that Dr. Austin's testimony in that case "had no convincing basis in either literature or logic." Dr. Austin cites two bases in the literature: (1) a 1971 article in the journal *Surgery*, by a Dr. Ralph B. Cloward, whom Dr. Austin describes as "the father" of the "anterior approach," stating that "serious complications are avoidable"; and (2) an otherwise unidentified piece by a Robert G. Watkins, on complications involved in the anterior approach, stating that "damage [to the recurrent laryngeal nerve] . . . is usually from vigorous retraction. . . . The key to the prevention of traction injuries to the nerve is not to retract vigorously. . . ." Dr. Austin further notes that Dr. Ditmore's defense expert in his malpractice trial testified that he disagreed with Dr. Austin because he thought the literature was wrong.

Even under the plaintiff-friendly summary judgment standard, this is not sufficient evidence to warrant a claim that the AANS's conclusion was so utterly wrong that only bad faith could explain it. Taking the evidence in the light most favorable to Dr. Austin, I must conclude that the AANS was indeed wrong, not merely that there was some basis in the literature for his testimony at Dr. Ditmore's trial. But even if the AANS was wrong, the evidence Dr. Austin provides does not show that it had to be crazy or lying to so conclude, and that is what would be required to give rise to an inference of bad faith. After all, even if serious injuries are "usually" avoidable on the anterior approach by avoiding vigorous retraction, that does not mean that an expert analyst must find to be *1155 convincing some testimony and evidence that only negligence could explain an injury of this sort in a particular case, that negligence was the only possible explanation in that particular case. Rea-

sonable experts could differ, and, without other evidence that the AANS proceedings were a sham, that means that Dr. Austin has not come forward with enough evidence of bad faith to persuade a rational jury.

D.

[6] Dr. Austin creatively argues that I should find for him because the AANS rules under which he was disciplined violate "public policy" by discouraging physicians from testifying for plaintiffs in medical malpractice cases. The public policy in question is that witnesses should not be intimidated from offering testimony they believe to be truthful. But there is no Illinois law giving a court power over the disciplinary decisions of a private association merely because they violate such a public policy. He cites a case in which the Northern District of Illinois enjoined an individual medical malpractice defendant from filing charges against a plaintiff's expert with the county Medical Association, *Konrad v. DeLong*, 57 F.R.D. 123 (N.D.Ill.1972), but that action did not involve a court's interfering with the internal affairs of a private association. In a nice bit of research, Dr. Austin locates a California state decision where a court reversed a doctor's expulsion from his medical association based on its finding that his testimony in court violated its ethics code. *Bernstein v. Alameda-Contra Costa Med. Ass'n*, 139 Cal.App.2d 241, 293 P.2d 862 (1956). That is an old case, however, and this is Illinois. In this state, the only bases for a court's power to interfere in the internal operations of a private association are violation of internal association rules, deprivation of due process, or bad faith. As far as Dr. Austin has shown, these are lacking, and so he loses as a matter of law.

III.

I GRANT the AANS's summary judgment motion, terminating this case. All other pending motions in this case are DENIED as moot.

47 F.Supp.2d 941
(Cite as: 47 F.Supp.2d 941)

United States District Court,
N.D. Illinois,
Eastern Division.

Dr. Donald C. AUSTIN, Plaintiff,
v.
THE AMERICAN ASSOCIATION OF NEUROLOGICAL SURGEONS, (founded in 1931 as The Harvey Cushing Society), Defendant.

No. 98 C 7685.

April 22, 1999.

MEMORANDUM OPINION AND ORDER

BUCKLO, District Judge.

The plaintiff, Dr. Donald C. Austin, brought this lawsuit against the defendant, The American Association of Neurological Surgeons [the "AANS"], alleging that the decision of the AANS to suspend his membership was influenced by bias and prejudice, and was not made in good faith. The AANS moves to dismiss for failure to state a claim. For the following reasons, the motion is denied.

Background[1]

Dr. Austin is a licensed neurological surgeon and a citizen of Michigan. The AANS is an Illinois not-for-profit corporation, with its principle place of business in Illinois. From 1963 through at least *942 March, 1995, Dr. Austin was a member in good standing of the AANS, a trade group of neurological surgeons. In 1993, Dr. Austin testified as an expert witness for the plaintiff against Dr. Q. Michael Ditmore, a neurological surgeon and member of the AANS, in a malpractice suit. Dr. Ditmore claimed that Dr. Austin's testimony violated the code of ethics of the AANS, and a hearing was held by the Professional Conduct Committee of the AANS [the "Committee"]. Dr. Austin presented evidence in support of his testimony, but the Committee recommended that he be suspended for six months. The recommendation was adopted by the Board of Directors of the AANS.

Dr. Austin alleges that the Committee's decision to suspend him was intended to punish him for testifying against Dr. Ditmore in the malpractice suit. According to Dr. Austin, the decision was influenced by bias and prejudice, and was not made in good faith. A substantial part of Dr. Austin's income is derived from testifying as a medical expert, and membership in good standing in the AANS is necessary for such testimony. Dr. Austin requests damages and an injunction directing the AANS to remove from its records any mention of disciplinary action taken against him. The AANS moves to dismiss the complaint for failure to state a claim.

---

[1] The background facts are taken from the complaint. When evaluating a motion to dismiss, I must take all well-pleaded factual allegations as true. *Prince v. Rescorp Realty*, 940 F.2d 1104, 1106 (7th Cir.1991).

Motion to Dismiss

[1][2][3] Absent a showing of economic necessity, Illinois courts generally will not review a private association's actions regarding its members. *National Ass'n of Sporting Goods Wholesalers, Inc. v. F.T.L. Marketing Corp.*, 779 F.2d 1281, 1285 (7th Cir.1985). The AANS argues that Dr. Austin has not shown that membership in the AANS is an economic necessity. Dr. Austin alleges in the complaint that he "derives a substantial part of his income from testifying as a medical expert," and that "[m]embership in good standing in the [AANS] is a necessary credential for such testimony." (Compl. § 12). The AANS claims that the suspension has not affected Dr. Austin's ability to practice medicine, and that networking opportunities and other such perks do not constitute economic necessity. Dr. Austin, however, has alleged that membership in good standing in the AANS is necessary for employment as a medical expert in his field. Economic necessity exists where "the association has an economic 'stranglehold' on the relevant market." *F.T.L.*, 779 F.2d at 1285. In addition, the Illinois Supreme Court has stated that a "strong possibility that an important economic interest of the plaintiffs was affected by an improper administrative proceeding gives the court power and the duty to act." *Van Daele v. Vinci*, 51 Ill.2d 389, 394, 282 N.E.2d 728, 731 (1972). Therefore Dr. Austin has alleged economic necessity sufficiently to survive a motion to dismiss.

[4][5] The AANS further argues that a court cannot review the substance of internal decisions by private associations. Courts can, however, intervene if the association did not afford its member due process, or if the association has violated its own bylaws. *F.T.L.*, 779 F.2d at 1285. Dr. Austin has alleged that the AANS has a

code of ethics, that a hearing was held to determine whether he violated that code, and that the decision to suspend his membership was made not in good faith but was the result of bias and prejudice. Whether the AANS complied with its internal rules in this process is not a question that can be determined on a motion to dismiss.

Conclusion

For the reasons discussed above, the motion to dismiss is denied.

Supreme Court, U.S.
FILED
NOV 6 2001
CLERK

(2)

No. 01-449

In the Supreme Court of the United States

DR. DONALD C. AUSTIN,

Petitioner,

vs.

AMERICAN ASSOCIATION OF NEUROLOGICAL SURGEONS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Supreme Court Rule 14 requires that a Petition for Writ of Certiorari shall contain "[T]he questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail." The Rule further requires that "[T]he questions should be short and should not be argumentative or repetitive." The questions presented by the Petitioner fail to comply with the Rule in that they improperly argue and/or suggest that only surgeons who testify for plaintiffs are subject to punishment under the Association's disciplinary procedures.

A proper statement of the questions will assist the Court in determining whether to grant or deny the Petition. The Respondent accordingly presents this Court with the following questions:

(1) Whether a disciplinary action taken by a private association with respect to one of its members is subject to judicial review under Illinois law where the member fails to show that an important economic interest is at stake.

(2) Whether a private, voluntary association of neurological surgeons may discipline one of its members who fails to abide by the association's code of ethics and expert witness guidelines applicable to all members who testify as expert witnesses in legal proceedings.

PARTIES TO PROCEEDING AND RULE 29.6 STATEMENT

Respondent, the American Association of Neurological Surgeons, hereinafter referred to as "AANS", is the party responding to the Petition for Writ of Certiorari. The AANS is an Illinois not-for-profit organization with a membership comprised of neurosurgeons. The AANS has no stock and, accordingly, there is no parent or publicly held company that owns 10% or more of the Association's stock.

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COUNTER-STATEMENT OF THE CASE

At its core, this case concerns an internal disciplinary proceeding held by the American Association of Neurological Surgeons ("AANS") with respect to one of its members. The AANS is a private, voluntary association of neurological surgeons whose primary purpose is to promote the advancement and pursuit of excellence in neurological surgery. Petitioner, Dr. Donald C. Austin ("Dr. Austin"), was a member of the AANS from 1963 to 1997, when he was suspended for six months for violating the AANS' Code of Ethics and Expert Witness Guidelines. Upon the effective date of his suspension, April 14, 1997, Dr. Austin resigned from the AANS and never attempted to reinstate his membership.

The disciplinary proceeding against Dr. Austin stemmed from expert witness testimony he provided on behalf of the plaintiff in a medical malpractice action against Dr. Q. Michael Ditmore, a neurological surgeon and member of the AANS. The plaintiff in that action sustained permanent injury to her recurrent laryngeal nerve after an anterior cervical fusion surgery performed by Dr. Ditmore. Dr. Austin opined that the mere existence of a permanent recurrent laryngeal nerve injury establishes surgical negligence and that the neurosurgical community generally accepted his opinion. The jury returned a verdict in favor of Dr. Ditmore and against the plaintiff.

Subsequent to the conclusion of the malpractice action, Dr. Ditmore exercised his right under the AANS' Bylaws to file a charge of unprofessional conduct against Dr. Austin. Dr. Ditmore asserted that Dr. Austin's testimony had violated the AANS' Code of Ethics and Expert Witness Guidelines. The AANS' Code of Ethics mandates

that a member who testifies as an expert witness shall "diligently and thoroughly prepare himself or herself with relative facts so that he or she can, to the best of his or her ability, provide the court with accurate and documentable opinions on the matters at hand." The Expert Witness Guidelines require that prior to offering expert testimony, a member should, *inter alia*, become familiar with all pertinent data of the particular matter at issue; review prior and current concepts related to standard neurosurgical practice in the matter at issue; and identify as such, personal opinions not generally accepted by other neurosurgeons.[1]

The AANS' Professional Conduct Committee ("PCC"), which processes charges of unprofessional conduct of any nature brought by one member against another, held a formal hearing on Dr. Ditmore's charge against Dr. Austin on October 15, 1995. Dr. Ditmore and Dr. Austin both attended the hearing and were represented by counsel. The PCC concluded that Dr. Austin violated the AANS' Code of Ethics and Expert Witness Guidelines in an "egregious manner" and recommended in its written report that Dr. Austin be suspended from AANS membership for a period of six months.

On April 26, 1996, the AANS' Board of Directors approved by secret ballot the PCC's recommendation to suspend Dr. Austin for a six-month period. As was his right under the AANS' Bylaws, Dr. Austin elected to appeal the suspension to the AANS' general membership

---

[1] The AANS' Expert Witness Guidelines encourage member neurosurgeons to testify impartially and prudently for both plaintiffs and defendants in matters brought before the courts.

at its next annual meeting on April 14, 1997. The AANS' general membership sustained the Board's suspension of Dr. Austin.

On December 1, 1998, Dr. Austin filed his complaint against the AANS, alleging that his suspension "was influenced by bias and prejudice and not made in good faith." Dr. Austin sought damages measured by the decline in his expert-witness income as a result of the suspension. In addition to monetary relief, Dr. Austin sought a mandatory injunction directing the AANS to expunge the record of the suspension.

The district court granted the AANS' motion for summary judgment, concluding that Dr. Austin failed to make a showing sufficient to warrant judicial interference in the internal affairs of a private association under Illinois law. The district court observed that under Illinois law, "the only bases for a court's power to interfere in the internal operations of a private association are violation of internal association rules, deprivation of due process, or bad faith." (Pet. App. 22.) As Dr. Austin failed to demonstrate violation of internal association rules, deprivation of due process or bad faith, the district court determined that "he loses as a matter of law." (Pet. App. 22.)

The Seventh Circuit affirmed the entry of summary judgment by the district court. Writing for the court, Judge Posner observed that dismissal of the suit was correct because Dr. Austin failed to show that an important economic interest, as the term is defined under Illinois law, was at stake. The court noted that membership in the AANS is not a precondition to Dr. Austin's primary profession, the practice of neurosurgery. (Pet. App. 7.) The court flatly rejected Dr. Austin's argument

that a decline in his expert-witness income constituted an important economic interest, stating that a decline in "moonlighting income" is not the kind of "professional body blow that the cases have in mind when they speak of an important economic interest jeopardized by the action of a voluntary association." (Pet. App. 8.)

The court of appeals also found that there was no basis for Dr. Austin's claim that the AANS only entertains complaints against members who testify on behalf of malpractice plaintiffs:

> What is true is that to date all complaints (but there have been very few) have been against such members; but the reason is at once obvious and innocent. If a member of the Association is sued for malpractice and another member gives testimony for the plaintiff that the defendant believes is irresponsible, it is natural for the defendant to complain to the Association; a fellow member has irresponsibly labeled him negligent. If a member of the Association who testifies for a plaintiff happens to believe that the defendant's expert witness was irresponsible, he is much less likely to complain, because that expert (and fellow member of the Association) has not accused him of negligence or harmed him in his practice or forced him to stand trial or gotten him into trouble with his liability insurer. The asymmetry that Austin points to as evidence of bad faith is thus no evidence of bad faith at all; and he has no other evidence of bad faith.

(Pet. App. 8-9.) The court of appeals rejected Dr. Austin's argument that the AANS' Code of Ethics and Expert Witness Guidelines, as written and applied, impede the

cause of justice and violate public policy. The court concluded that "professional self-regulation" or "policing of expert witnessing" serves to further rather than impede the cause of justice. (Pet. App. 9-11.)

MISSTATEMENTS IN THE PETITION

The Petition contains numerous misstatements of fact. In compliance with Supreme Court Rule 15.1, the AANS notes the following misstatements contained in the Petition:

1. Petitioner asserts that the AANS' Professional Conduct Committee found that his testimony in the malpractice action was "unsupported by literature or logic." (Pet. 2.) Petitioner misstates the PCC's findings. The PCC concluded as follows:

> The Professional Conduct Committee has concluded that there is no convincing basis in either literature or logic for [Dr. Austin's] testimony that permanence of a recurrent laryngeal nerve injury establishes surgical negligence as its cause. Furthermore, the Committee feels Dr. Austin's assertion that this opinion is generally accepted by the neurosurgical community is entirely false. The Professional Conduct Committee believes that Dr. Austin is in violation of AANS Expert Witness Guidelines in that he failed to present to the court those opinions which represent the broad spectrum of neurosurgical thought and practice; and, more specifically, in violation of 16(a)(2) in that his testimony revealed that he did not adequately review prior and current concepts related to standard

> neurosurgical practice in the matter at issue; and 16(a)(4) in that he falsely represented his own opinion as that of the profession generally. From Dr. Austin's testimony cited above, the Committee also concludes that Dr. Austin did not diligently and thoroughly prepare himself with the relative facts and did not provide the court with accurate and documentable opinions as to the matter of permanent injury of the recurrent laryngeal nerve in anterior cervical fusions, in violation of Section V(B) of the AANS' Code of Ethics. The Committee believes that Dr. Austin's testimony in this case was a particularly egregious violation of AANS testimony guidelines.

(Report of the Professional Conduct Committee at 4-6.)

2. Petitioner asserts that "the only medical expert disclosed in pre-trial proceedings opined that Dr. Austin's testimony was correct." (Pet. 2, n. 1.) In making such an assertion, Petitioner vastly overstates the opinion of his own expert witness, Dr. Robert L. McLaurin. Dr. McLaurin opined that "permanent paralysis *usually* results from severe traction, compression, or actual diversion of the nerve" and that the nerve injury in the underlying medical malpractice action "was the result of a moderately severe or severe injury to the nerve." (McLaurin Report) (emphasis added). Dr. McLaurin did not opine that the mere existence of permanent injury establishes surgical negligence as its cause.

3. Petitioner states that he has "never contended that the procedures the AANS followed were unfair or inadequate." (Pet. 2, n. 2.) However, in his sworn Answers to Interrogatories, Petitioner asserted that the AANS failed "to conduct a fair and unbiased hearing." Further, in his

sworn Answers and Objections to the AANS' Second Set of Interrogatories, Petitioner charged that the October 15, 1995 hearing before the PCC was biased and unfair. Petitioner failed to develop any such evidence of unfairness during the course of discovery and he has now abandoned that as an element of his case.

4. Petitioner asserts "that the district court was presented with unrebutted evidence that the Expert Witness Guidelines under which Dr. Austin was punished were established by the AANS for the purpose of manipulating the manner in which the judicial system was handling medical malpractice cases." (Pet. 3.) Petitioner failed to make such a showing to the district court or the court of appeals. The 1976 report of the AANS' Professional Liability Committee, upon which Dr. Austin bases his assertion, completely undermines his claim:

> We would emphasize that the role of the expert witness is not to win the case for his client. That is the lawyers' role. The expert must confine his role to that of a technical resource, explaining and documenting the concerns, responsibilities and practices of a responsible neurosurgeon in the matter at issue. Slanting of testimony by an "expert" for either side is professionally abhorrent and the AANS has the duty, as the spokesman for American neurosurgery, to be sure that its members do not engage in these practices.

(Report of the Professional Liability Committee at 244.)

5. The Petition implies that the AANS' Expert Witness Guidelines were enacted on the heels of the 1976 report of the Professional Liability Committee. (Pet. 3-4.) However, it is undisputed that the current Expert Wit-

ness Guidelines were not adopted by the AANS' Board of Directors until December of 1983.

6. Petitioner asserts that "all prosecutions under the Expert Witness Guidelines" have been brought against members who testified on behalf of plaintiffs and that "[n]o defendant's expert has ever been charged." (Pet. 5.) However, Dr. Austin himself filed a charge of unprofessional conduct against a member he accused of giving improper expert testimony on behalf of a defendant surgeon. (Blackett Dep. at 20.)

7. Petitioner asserts that if an expert witness opinion cannot be found in the medical literature, the AANS' Code of Ethics prohibits its members from expressing that opinion in court. (Pet. 16.) Neither the AANS' Code of Ethics nor its Expert Witness Guidelines contain such language. The Code of Ethics mandates that a member who testifies as an expert shall "diligently and thoroughly prepare himself or herself with the relative facts" so as to provide the court with "accurate and documentable opinions on the matters at hand." The Expert Witness Guidelines require that members who testify as expert witnesses must identify as such, "personal opinions not generally accepted by other neurosurgeons."

REASONS FOR DENYING THE WRIT

The Seventh Circuit's decision does not warrant review. The decision below is in accord with well-settled principles of Illinois law pertaining to judicial review of the internal affairs of a private association. The ruling is also consistent with decisions of this Court as well as many others regarding the ability of a professional association to discipline its members for failing to abide

by the association's internal rules. Petitioner has stated no reasonable basis for review of the decision of the court of appeals and Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

I. THE DECISION BELOW DOES NOT CONFLICT WITH ILLINOIS LAW PERTAINING TO JUDICIAL REVIEW OF THE INTERNAL AFFAIRS OF A PRIVATE ASSOCIATION.

Dr. Austin's Petition does not warrant review by this Court because the Seventh Circuit decided the case in accordance with Illinois law relating to judicial review of the internal affairs of a private association. The court of appeals determined that the entry of summary judgment was appropriate because Petitioner failed to show that "an important economic interest" was at stake. (Pet. App. 7.) The court of appeals' holding is correct and is not at odds with Illinois law as it pertains to private associations.

Under Illinois law, private associations have great discretion when conducting their internal affairs, especially when their conduct relates to the interpretation and enforcement of association rules and regulations. *International Test and Balance, Inc. v. Associated Air and Balance Council*, No. 98 C 2553, 1999 WL 377849, at *7 (N.D. Ill. Jun. 7, 1999); *Engel v. Walsh*, 101 N.E. 222, 223-224 (Ill. 1913); *Lee v. Snyder*, 673 N.E.2d 1136, 1139 (Ill. App. Ct. 1996). Judicial intervention in the internal affairs of a voluntary association is only appropriate when: (1) the operation of the association significantly harms an important economic interest of the plaintiff belonging to the association when it acted; and (2) the association either (a) failed to act in accord with its own

constitution and bylaws; (b) was influenced by bias, prejudice, or lacking in good faith; or (c) violated due process. *Van Daele v. Vinci*, 282 N.E.2d 728, 731-32 (Ill. 1972); *Finn v. Beverly Country Club*, 683 N.E.2d 1191, 1193 (Ill. App. Ct. 1997); *National Ass'n of Sporting Goods Wholesalers, Inc. v. F.T.L. Marketing Corp.*, 779 F.2d 1281, 1285 (7th Cir. 1985).

Applying the above standard, the court of appeals found that Petitioner's six-month suspension from the AANS did not constitute harm to "an important economic interest" as defined under Illinois law. (Pet. App. 7-8.) The court of appeals observed that membership in the AANS is not a precondition to the practice of neurosurgery and that Petitioner continued to practice neurosurgery notwithstanding his suspension and subsequent voluntary resignation from the AANS.[2] (Pet. App. 7.) Under Illinois law, where membership in an association is optional, suspension/expulsion or denial of admission is not deemed the invasion of an important economic interest. *Treister v. American Academy of Orthopaedic Surgeons*, 396 N.E.2d 1225, 1231-32 (Ill. App. Ct. 1979); *Finn*, 683 N.E.2d at 1193; *Lee*, 673 N.E.2d at 1139. *See also San Juan v. American Bd. of Psychiatry and Neurology, Inc.*, No. 93 C 5806, 1994 WL 66077, at *1 (N.D. Ill. 1994) (plaintiff does "not come close" to satisfying economic necessity requirement where membership merely improves professional opportunities); *Kaneria v. American Bd. of Psychiatry and Neurology, Inc.*, 832 F. Supp. 1226, 1230 (N.D. Ill. 1993) (benefits such as additional salary, career advancement, service as expert witness, and enhanced recognition, although economi-

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[2] The Seventh Circuit also noted that the "AANS is not even the only association of such surgeons." (Pet. App. 7.)

cally desirable, clearly do not rise to the level of economic necessity).

Notably, the court of appeals rejected Petitioner's argument that the drop in his expert-witness income constituted an important economic interest jeopardized by the action of a voluntary association:

> True, his income from testifying has fallen to 35 percent of what it was before the suspension, when it was more than $220,000 a year. Austin's brief describes this drop in income as "disastrous" and "catastrophic," but that is a hyperbolic characterization. Thirty-five percent of $220,000 is a healthy $77,000—and this is merely as it were Dr. Austin's moonlighting income, income from a sideline to his primary profession, which is that of a neurosurgeon, not an expert witness (he does not claim the dubious title of "professional expert witness"). That is not the kind of professional body blow that the cases have in mind when they speak of an "important economic interest" jeopardized by the action of a voluntary association.

(Pet. App. 7-8.) The court of appeals further noted that, at the very least, the "association's action must jeopardize the principal source of the professional's livelihood, and not a mere sideline." (Pet. App. 8.)

Petitioner does not challenge, let alone acknowledge, the court of appeals' ruling that he failed to show that membership in the AANS is an important economic interest. Without such a showing, a court is precluded from involving itself in the internal affairs of an association under Illinois law. *Kaneria*, 832 F. Supp. at 1230.

Thus, further review by this Court is completely unwarranted.

II. THE DECISION BELOW IS CONSISTENT WITH COMMON LAW PRECEDENT REGARDING THE ABILITY OF A PROFESSIONAL ASSOCIATION TO DISCIPLINE A MEMBER FOR FAILING TO ABIDE BY THE ASSOCIATION'S INTERNAL RULES.

In a transparent attempt to give this case broader appeal, Petitioner argues that the court of appeals' decision departs from "300-year-old insights" which the common law has used to protect our judicial system from manipulation. Contrary to Petitioner's hyperbole, the decision below does not overturn any common law precedent as it relates to protecting witnesses from the threat of subsequent civil liability arising out of their testimony. Rather, the ruling properly reflects the distinction between civil liability and professional discipline and does not call for review by this Court.

In *Imbler v. Pachtman*, 424 U.S. 409 (1976), this Court held that in initiating a prosecution and presenting a state's case, a prosecutor is immune from a civil suit for damages under 42 U.S.C. § 1983. However, the Court emphasized that the policy considerations which compel immunity from civil liability for prosecutors did not preclude professional discipline:

> Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.

Id. at 429. Following this Court's lead, numerous other courts have distinguished professional discipline from civil liability and determined that the policies served by protecting witnesses from civil liability as a result of their testimony do not act as a bar to professional discipline.

For example, in *Deatherage v. State of Washington Examining Board of Psychology*, 948 P.2d 828 (Wash. 1997), the Washington Supreme Court held that the witness immunity doctrine did not bar a state licensing board from initiating professional disciplinary proceedings against an expert witness. In so holding, the court stated that a "disciplinary proceeding is not a civil suit against the expert, and the policies that underscore witness immunity do not apply." *Id.* at 831. The court also stated that allowing a professional to be subjected to discipline for unprofessional conduct "serves to advance the court's goal of accurate testimony from expert witnesses, and furthers the disciplinary board's goal of protecting the public." *Id.* at 832. Relying upon the principles enumerated in *Imbler*, the court noted that the threat of professional discipline is an appropriate check on individuals who are otherwise immune from civil liability. *Id.*

Similarly, in *Budwin v. American Psychological Ass'n*, 29 Cal. Rptr. 2d 453 (Cal. Ct. App. 1994), the California Appellate Court held that a professional association is not precluded by the litigation privilege from disciplining a member for making false representations in a judicial proceeding. *Id.* at 458. Drawing on this Court's discussion of amenability to professional discipline in *Imbler*, the California Appellate Court observed that the litigation privilege "has not been extended to preclude professional disciplinary liability." *Id.* at 457. The court also

stated that "a perfectly legitimate objective of professional associations is to attempt to elevate professional standards." *Id.* at 459.[3]

After considering the relevant facts and the applicable law, the court of appeals properly determined that it was not against public policy for the AANS to discipline Petitioner for giving expert testimony that violated the Association's Code of Ethics and Expert Witness Guidelines. The court explained, "this kind of professional self-regulation rather furthers than impedes the cause of justice." (Pet. App. 9.) The court of appeals also observed that the AANS, as well as the community at large, have an interest in Dr. Austin "not being able to use his membership to dazzle judges and juries and deflect the close and skeptical scrutiny that shoddy testimony deserves." (Pet. App. 9.) The decision below is consistent with this Court's decision in *Imbler* as well the decisions of other courts that have had occasion to consider this issue. Accordingly, review by this Court is unnecessary.

Significantly, none of the cases relied upon by Petitioner support his claim that the litigation or testimonial privilege somehow acts as a bar to professional discipline. Petitioner's reliance on this Court's decision in *Briscoe v. LaHue*, 460 U.S. 325 (1983), is misplaced. In *Briscoe*, this Court held that 42 U.S.C. § 1983 does not authorize a convicted person to assert a damages claim against a police officer for giving perjured testimony at

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[3] *See also Silberg v. Anderson*, 786 P.2d 365, 373 (Cal. 1990) (absolute immunity for attorney does not prohibit professional discipline); *Moses v. McWilliams*, 549 A.2d 950, 954 n.7 (Pa. Super. Ct. 1988) (absolute immunity for physician does not prohibit professional discipline).

his criminal trial. *Id.* at 325-326. The Court observed that subjecting government officials such as police officers to damages liability under section 1983 would likely result in an increase in lawsuits and would serve to divert police officers from the effective performance of their public duties. *Id.* at 342-43. There is nothing in this Court's opinion in *Briscoe* which even remotely suggests that it intended to shield a paid expert witness like the Petitioner from professional discipline for giving improper testimony in a judicial proceeding.

Petitioner's reliance on *Konrad v. De Long*, 57 F.R.D. 123 (N.D. Ill. 1972), *Meyer v. McDonnell*, 392 A.2d 1129 (Md. Ct. Spec. App. 1978), and *L'Orange v. Medical Protective Co.*, 394 F.2d 57 (6th Cir. 1968) is similarly misplaced. All of these cases are factually distinguishable as they involved threats of witness intimidation made during a pending case in which the witness was testifying. The AANS' policy is to refrain from even considering charges of unprofessional conduct until after the resolution of the underlying suit. (AANS Code of Ethics.)

Finally, Dr. Austin's invocation of the California Appellate Court's decision in *Bernstein v. Alameda Contra Costa Med. Ass'n*, 293 P.2d 862 (Cal. Ct. App. 1956), to support his Petition is flawed. In *Budwin v. American Psychological Ass'n*, the California Appellate Court strictly limited *Bernstein* to its facts, stating as follows:

> Furthermore, as the *Bernstein* court noted implicitly, the ethical rule at issue there prohibited any criticism of the preceding doctor, even if it were truthful and made in good faith. The *Bernstein* court focused on the width of this ethical broad brush, and concluded that its application to disparaging statements made in the course of

> legal proceedings violated the public policy articulated in section 47(b). The court did not hold that section 47(b) precluded a voluntary, professional association from disciplining a member for misrepresentations made in the course of an official proceeding; no California court in nearly 40 years of *Bernstein's* existence has read the decision that way.

Budwin, 29 Cal. Rptr. 2d at 458. The *Bernstein* court's holding does not support Petitioner's claim that he is somehow immune from professional discipline and fails to provide a basis for this Court's review.

III. THE DECISION BELOW DOES NOT CONFLICT WITH *DAUBERT*.

In an attempt to create an issue worthy of writ consideration, Petitioner asserts that the Seventh Circuit's decision "effectively overruled *Daubert*." (Pet. 18.) Petitioner argues that the decision below will allow medical societies such as the AANS to interfere with the "gatekeeping" function of the trial judge in determining the admissibility of expert testimony in judicial proceedings. Petitioner further argues that the AANS' standards governing expert testimony are inconsistent with *Daubert*. Both contentions are meritless.

A. The Decision Below Does Not Interfere With The District Court's Gate-Keeping Role.

In *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), this Court established a two-prong analysis for determining whether expert testimony is admissible under the Federal Rules of Evidence. The

analysis requires the district court to perform a "gate-keeping" role. *Id.* at 595. First, the district court must determine whether the expert's testimony is based on scientific knowledge. *Id.* at 592. The Court identified four factors that the district court might consider in evaluating scientific validity: (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the method's known or potential rate of error; and (4) whether the theory or technique finds general acceptance in the scientific community. *Id.* at 593-594. Under the second prong of the analysis, the district court must determine whether the proffered expert testimony "will assist the trier of fact to understand or determine a fact in issue." *Id.* at 592.

Petitioner's argument that the decision below infringes upon the autonomy of the district court in performing its gate-keeping function is based on a tortured reading of the court of appeals' opinion. Nowhere in the opinion did the Seventh Circuit suggest that the AANS, or any other medical society, has the right or authority to decide the admissibility of expert testimony. Instead, the opinion makes clear that the *Daubert* analysis remains squarely within the exclusive province of the district court. The Seventh Circuit's ruling simply reflects its view that no conflict exists between the district court's gate-keeping function and the AANS' enforcement of its internal rules relating to the content of expert testimony.

Further, nothing in the AANS' rules themselves speaks of admissibility of expert testimony. The AANS' rules require that a member appearing as an expert witness testify "prudently" and "identify as such personal opinions not generally accepted by other neurosurgeons." The rules further require that a member testify-

ing as an expert witness "provide the court with accurate and documentable opinions on the matters at hand." The rules are absolutely devoid of any language relating to admissibility.

The AANS' enforcement of its Code of Ethics and Expert Witness Guidelines also has no impact on the district court's gate-keeping function. The AANS' disciplinary process is an "after-the-fact" self-policing mechanism. The district court's gate-keeping role, on the other hand, involves a pre-testimony screening for reliability and relevance of an expert's opinions. Contrary to Petitioner's suggestion, the gate-keeping role of the district court set forth in *Daubert* in no way prohibits self-policing in the medical community.

B. The AANS' Standards Governing the Content of Expert Witness Testimony Are Not Inconsistent With *Daubert*.

Petitioner asserts that the AANS' standards preclude its members from expressing an expert opinion in court if the "opinion is not found in the medical literature" and that such a blanket rule is forbidden under *Daubert*. Petitioner's argument misstates the AANS' rules. Neither the AANS' Expert Witness Guidelines nor its Code of Ethics contain such a limitation.

The Expert Witness Guidelines require an expert witness to adequately review prior and current concepts related to standard neurosurgical practice in the matter at issue and to distinguish his or her own personal opinions from those generally accepted by other neurosurgeons. (Expert Witness Guidelines 16a(2) and (4).) The Code of Ethics requires an expert witness to "diligently

and thoroughly prepare himself or herself with relative facts so that he or she can, to the best of his or her ability, provide the court with accurate documentable opinions on the matters at hand." (Code of Ethics V(B).) Contrary to Petitioner's assertion, neither standard can be read as a "blanket rule" requiring that an opinion be found in medical literature before it can be expressed in court.[4]

Petitioner's characterization of the AANS standards as applicable only to plaintiffs' experts is likewise flawed. As the court of appeals observed, "[t]here is no basis for Austin's claim that the Association entertains only complaints against members who testify on behalf of malpractice plaintiffs." (Pet. App. 8.) The Expert Witness Guidelines apply to all members, regardless of whether they testify on behalf of plaintiffs or defendants. The decision below is in no way inconsistent with *Daubert* and does not warrant review by this Court.

IV. THIS CASE DOES NOT HAVE FAR-REACHING IMPLICATIONS IN MEDICAL MALPRACTICE LITIGATION.

Petitioner argues that the court of appeals' decision will "quickly and dramatically" tilt the playing field in

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[4] By requiring thorough preparation and review of "prior and current concepts related to standard neurosurgical practice in the matter at issue," the AANS' standards are entirely consistent with the factors enumerated in *Daubert* for determining whether an expert's opinion is based on scientific knowledge. Similarly, the AANS' requirement that members serving as expert witnesses distinguish personal opinions from those generally accepted as the proper standard of care also correlates with the factors enumerated in *Daubert*.

medical malpractice litigation "in favor of defendants." Indeed, he goes so far as to suggest that the court of appeals "effectively has given the AANS, and every other medical society, the power to control medical malpractice litigation against doctors."[5] Petitioner's argument greatly overstates the significance of the decision below and fails to create an issue worthy of writ consideration.

Grasping at straws, Petitioner suggests that the AANS' Expert Witness Guidelines and Code of Ethics, as written and applied, are designed to punish and/or "silence" plaintiff's experts. Significantly, Petitioner fails to cite any section of the Expert Witness Guidelines or Code of Ethics that is inherently biased against members who choose to testify on behalf of plaintiffs in medical malpractice actions. The Expert Guidelines and Code of Ethics set forth guiding principles for the content of expert testimony. The provisions apply to the expert testimony of any member, regardless of whether the opinion testimony is rendered on behalf of a plaintiff or a defendant.[6]

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[5] Petitioner asserts that by filing an *amicus curiae* brief in support of the AANS, the American Medical Association, the Illinois State Medical Society and the American College of Surgeons demonstrated that "they, too, plan to implement similar rules." There is nothing in the record which supports Petitioner's baseless assertion.

[6] Although, as Petitioner points out, the majority of charges have been brought against members who testified on behalf of plaintiffs, there is nothing in the Expert Witness Guidelines or Code of Ethics that prevents a member from bringing a charge of unprofessional conduct against a member who testified for a defendant. Indeed, Petitioner himself filed a

(continued...)

Further, Petitioner's argument that the AANS' Expert Witness Guidelines will deter the great majority of surgeons from testifying as experts on behalf of plaintiffs is undermined by Petitioner's own behavior. As the court of appeals observed, Petitioner "continues to testify extensively as an expert witness in medical malpractice cases." (Pet. App. 7.) Thus, the perceived threat of "severe economic sanctions" certainly has not deterred Petitioner from testifying as an expert on behalf of plaintiffs.

Petitioner's argument is further undercut by the limited number of proceedings instituted under the Expert Witness Guidelines and the even fewer number of actions that resulted in suspension or expulsion from the AANS. Since the adoption of the Expert Witness Guidelines in 1983, a total of twenty disciplinary proceedings have been brought against members who were alleged to have provided improper testimony on behalf of a plaintiff. Of those twenty proceedings, four resulted in suspension of membership and one resulted in expulsion from the AANS. (Answer to Pl.'s Interrogs.) These are hardly the type of figures that will "quickly and dramatically" tilt the playing field in medical malpractice litigation. Simply stated, this case will have little to no impact on medical malpractice litigation and does not warrant this Court's review.

(...continued)
charge of unprofessional conduct against a member he accused of giving improper expert testimony on behalf of a defendant doctor. Petitioner subsequently elected not to prosecute the charge.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated this 6th day of November, 2001.

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Supreme Court, U.S.
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No. 01-449

In the Supreme Court of the United States

DR. DONALD C. AUSTIN,

Petitioner,

vs.

AMERICAN ASSOCIATION OF NEUROLOGICAL SURGEONS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

The AANS' Brief in Opposition argues that this dispute is a private matter between a private association and a member that has no wide-ranging implications for the judicial system.

This is simply not true.

I. THE CIRCUIT COURT'S DECISION HAS A FAR-REACHING EFFECT THAT GIVES THE AANS AND OTHER MEDICAL ASSOCIATIONS LIKE IT THE POWER TO RADICALLY CHANGE THE LAW REGARDING PROFESSIONAL MALPRACTICE

A. The Circuit Court's Decision Overturns Hundreds of Years of Common Law Precedent

Notwithstanding its dismissive rhetoric, the AANS cites no case approving punishment (civil liability, criminal punishment, or even "professional discipline") for testimony that was not knowingly false. On the contrary, the cases approve "professional discipline" only for *knowingly* false testimony (*i.e.*, perjury)—a far narrower standard than the one the AANS applied to Dr. Austin and which it (and other medical associations) hopes to apply to the testimony of other members who testify in the future. *Budwin v. American Psych. Assoc.*, 29 Cal. Rptr. 2d 453, 458 (Cal. Ct. App. 1994) (permitting discipline of a psychiatrist who "made representations to the court *knowing* that they were false or *knowing* that he lacked sufficient information to warrant them"); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (noting in *dicta* that a lawyer could be punished under the ABA Code of Professional Responsibility EC 7-13 for acts, all of which require an intent to deceive); *Silverberg v. Anderson*, 786 P.2d 365, 373-74 (Cal. 1990) (noting in *dicta* that an attorney could be subject to criminal prosecution for perjury or for violating disciplinary rules that

prohibit *knowingly and intentionally* misleading the court); *Deatherage v. State of Washington Examining Board of Psychology*, 948 P.2d 828, 832 (Wash. 1997) (permitting the state to revoke a psychiatrist's license for conduct involving "moral turpitude, dishonesty or corruption"—terms that, when applied to court testimony, require an *intent* to deceive).

Under the AANS Expert Witness Guidelines, though, a member can be punished for court testimony that is merely not "accurate and documentable". There is no requirement in the Code of Ethics that the member knowingly testify falsely or intend to deceive or mislead. All that is necessary is that the AANS' Professional Conduct Committee ("PCC") disagree with the content of the member's testimony.

In every case that involved an attempt to discipline a doctor for anything other than knowingly false testimony (*Bernstein v. Alameda Contra Costa Med. Ass'n*, 293 P.2d 862 (Cal. Ct. App. 1956), *Konrad v. DeLong*, 57 F.R.D. 123 (N.D. Ill. 1971) and *Meyer v. McDonnell*, 392 A.2d 1129 (Md. Ct. App. 1978)) the court either held or observed that these attempts at discipline by private organizations would not be allowed.

B. This Case Will Have Far-Reaching Implications

The AANS argues that this case is unimportant because: (a) there is no evidence that any other medical association will follow the AANS' lead in punishing expert testimony by its members; (b) the AANS' rules do not apply only to plaintiffs' experts; and (c) the AANS' rules are unlikely to deter expert testimony.

The AANS argues that "there is nothing in the record which supports Petitioner's baseless assertion" that the American Medical Association and other medical societies

that filed *amicus* briefs in the circuit court plan to implement expert witness rules similar to the AANS'. However, the AMA began studying such a plan shortly before Dr. Austin's lawsuit was filed in the district court.[1] It requires no great leap of logic to surmise that the AMA and other medical associations will be emboldened by the AANS' success and follow its example.

Though the AANS is correct that its Expert Witness Guidelines do not expressly refer only to plaintiffs' experts, they were written so they only ever would be applied to plaintiffs' experts. *See infra*, pp. 5-7.

The AANS argues that its Expert Witness Guidelines will not deter members from testifying because: (a) Dr. Austin continues to testify as an expert even after he was punished, and (b) there have been only twenty-three[2] prosecutions under the Guidelines.

The first contention is ridiculous. Dr. Austin has already been punished for his testimony; since he is no longer a member of the AANS he has nothing to fear from it. Why not make the best of a bad situation? The second contention fares no better. Prosecution under the AANS Expert Witness Guidelines is essentially a weapon to secure compliance. The AANS does not need to use this weapon every time, or even more than once, to send a clear message of danger that is sufficient to deter testimony.

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[1] Michael Higgins, *Docking Doctors? AMA eyes discipline for physicians giving 'false' testimony*, ABA Journal, Sept. 1998, at 20 (*cited in* Pet. for Writ of Cert., p. 15 n 4).

[2] Though the AANS claims there have been only twenty prosecutions under the Expert Witness Guidelines (Brief in Opposition at 21), its Answers to Interrogatories identified 23 such prosecutions.

II. THE AANS' ENFORCEMENT OF ITS EXPERT WITNESS GUIDELINES IS NOT "PROFESSIONAL DISCIPLINE"

The AANS Expert Witness Guidelines and procedures bear little resemblance to the "professional discipline" procedures endorsed by the cases the AANS cites. Rather, the AANS procedures offer its members a near-perfect substitute for a civil lawsuit seeking to punish a plaintiffs' expert witness for testimony.

A. "Professional Discipline" is Prosecuted by The Professional Association, Not by the Complaining Witness

In a professional disciplinary proceeding, after the complaining witness files his allegations of wrongdoing the matter is investigated and prosecuted by a presumably disinterested third party. *Deatherage* at 831 ("even if the injured party initiates a disciplinary complaint, that individual is not a party to the proceedings"). Under the AANS' procedures, though, the complaining member prosecutes the case. (Procedural Guidelines of the PCC.)

In fact, the complaining member actually retains *greater* control over the prosecution than he would in a civil lawsuit. In civil litigation, the defendant and the trial judge have numerous means to summarily dispose of a meritless case prior to trial. Under the AANS' procedures, although the PCC can issue a finding of no probable cause, the complaining witness/prosecutor has the right to overrule that decision and force the defendant to stand trial. (Deposition of Dr. Ulrich Batzdorf, p. 16.)

B. "Professional Discipline" Allows Injured Parties and the General Public to File Charges of Unprofessional Conduct

Further, the AANS' procedures cannot be called "professional discipline" because they are plainly designed and intended for the protection of AANS members, not the general public. Under any system of professional discipline, those most likely to be injured by a professional's shortcomings—his clients, customers or patients—have standing to complain. In *Budwin*, for example, the complaint that Dr. Budwin gave perjured testimony as a supposedly neutral psychological expert in a divorce proceeding was initiated by one of the parties. A disciplinary proceeding against a lawyer, which this Court implicitly endorsed in *Imbler*, can be commenced by the complaint of any person. Ill. Sup. Ct. Rule 752(a). Similarly, in *International Test and Balance, Inc. v. Associated Air and Balance Council*, No. 98 C 2553, 1999 WL 377849 (N.D. Ill. Jun. 7, 1999), the disciplinary proceeding was initiated by a complaint by the member's customer.

Under the AANS' procedures, though, only an AANS member can charge another member with unprofessional conduct. (AANS Bylaws, Art. II, Sec. 3.) Those in the best position to expose a neurosurgeon's unprofessionalism have no standing to complain. Not surprisingly, virtually all disciplinary cases before the AANS have involved court testimony, not patient care. Further, no charge of unprofessional court testimony has ever been brought against a defense expert.[3]

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[3] The AANS' denial of this fact ignores its clear interrogatory answers, which identified no prosecutions of defendant's experts. The testimony it cites in its brief is not only an attempt

(continued...)

Someone once observed that "The law, in its infinite wisdom, prohibits both the rich and the poor from sleeping under the bridges of Paris." Those laws may or may not have been intended solely to apply to the poor, but they do nevertheless. Likewise, whether or not the AANS' rules were intended solely to apply to plaintiffs' witnesses, that is their ultimate effect.

C. The AANS Never Intended Its Expert Witness Guidelines to be Professional Discipline

The Expert Witness Guidelines were adopted by the AANS in response to what it perceived as a "crisis" in medical malpractice litigation—too many verdicts against neurological surgeons.[4] Though written in even-handed language, the Expert Witness Guidelines were designed to

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[3] (...continued)
to impeach the AANS' admission, but is equivocal. Dr. W. Ben Blacket testified as follows:

> Q. Has any charge ever been brought against a doctor for anything he said as an expert witness testifying for a defendant?
>
> A. Not since I have been on the committee. Well, let me amend that. *I think* a charge was made by a Dr. Austin at one time, but then he did not prosecute that.

(Dep. of Dr. Blackett, p. 20) (emphasis added).

[4] While the AANS insists that "the current Expert Witness Guidelines were not adopted by the AANS' Board of Directors until December of 1983", (Brief in Opposition, pp. 7-8), the Guidelines adopted in 1983 are virtually identical to those adopted in 1976—the only differences are the addition of a comma and the word "the."

be applied only to plaintiffs' experts precisely because the AANS viewed them, not negligent doctors, as the problem. The AANS confirmed as much when it announced, in its 1997 Annual Report, that "The Professional Conduct Committee continues to provide a resource to *members* who may have been aggrieved by another member of the organization in a tort proceeding." (1997 AANS Annual Report at 27) (emphasis added). The AANS' Expert Witness Guidelines exist and function not to expose incompetent or dishonest neurosurgeons, but to protect them.

III. MEMBERSHIP IN THE AANS IS OF SUFFICIENT ECONOMIC IMPORTANCE TO GIVE IT THE POWER TO COERCE ITS MEMBERS INTO NOT TESTIFYING FOR PLAINTIFFS IN MALPRACTICE CASES

The AANS argues that the circuit court's opinion was correct because: (a) "[j]udicial intervention in the internal affairs of a voluntary association is only appropriate when . . . the operation of the association significantly harms an important economic interest of the plaintiff", and (b) the circuit court correctly held that Dr. Austin did not satisfy this standard. (Brief in Opposition at 9.) Neither argument is correct.

A. The "Important Economic Interest" Test Does Not Give Private Associations Free Reign to Interfere With the Judicial System

The requirement that an "important economic interest" be at stake before a court will intervene is entirely appropriate for cases involving the purely internal affairs of private association. Where there are no, or minimal, external consequences of the association's actions, this rule is appropriate.

The "important economic interest" test has no relevance, though, when the private association's actions have external consequences that violate public policy, such as interfering with the judicial system. Note, *Development in the Law – Judicial Control of Actions of Private Associations*, 76 Harv. L. Rev. 985, 1006-07 (1963). No person—neither private association nor private individual—may violate public policy by interfering with the judicial system.

B. Even if the "Important Economic Interest" Test Does Apply, Dr. Austin Satisfied It

The circuit court held that Dr. Austin had failed to show that an "important economic interest" is at stake because "Membership in the American Association of Neurological Surgeons is not a precondition to the practice of neurosurgery." (Pet. App. 7.) This is not the correct legal standard.

Treister v. American College of Surgeons, 396 N.E.2d 1225 (Ill. App. Ct. 1979), recognized a distinction between an association's discipline of current members and its decision whether to admit a prospective member, and only in the latter case required that the denial of membership be tantamount to denying the member the opportunity to practice his chosen profession. For cases involving discipline of a current member, *Treister* reaffirmed the rule articulated in *Virgin v. American College of Surgeons*, 192 N.E.2d 414 (Ill. App. Ct. 1963), in which the court reversed the plaintiff's expulsion from the association even though there was no suggestion that the expulsion would prevent him from practicing medicine.

As the trial judge in this case correctly held, a member of a private association "need not show that he will be rendered homeless or even driven to bankruptcy by its

unfair action that caused him significant economic harm." (Pet. App. 18.) Dr. Austin presented evidence showing that the AANS' actions have cost him hundreds of thousands of dollars in lost income. This satisfies the "important economic interest" standard.

IV. THE CIRCUIT COURT'S DECISION OVERRULES *DAUBERT* BY ALLOWING THE AANS TO CHILL EXPERT WITNESS TESTIMONY AND THEREBY DEPRIVE THE TRIAL COURT OF POTENTIALLY ADMISSIBLE EVIDENCE

The AANS argues that its Expert Witness Guidelines do not overrule *Daubert* because:

> The AANS' disciplinary process is an "after-the-fact" self-policing mechanism. The district court's gate-keeping role, on the other hand, involves a pre-testimony screening for reliability and relevance of the expert's opinions.

(Brief in Opposition, p. 18.) This argument is too simplistic. Any system of "after-the-fact" discipline is intended, at least in part, to secure before-the-fact compliance to some standard. As this case demonstrates, the AANS' standard is that its members may not testify as plaintiffs' experts, even where their testimony is held to be both reliable and relevant by the trial judge, if the PCC disagrees with their opinions.

Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) abolished the "general acceptance" standard for admissibility of expert testimony, holding that the trial judge, not the profession, must decide whether testimony is reliable. The AANS seeks to reestablish the "general acceptance" standard for plaintiffs' experts by threatening with punishment those who would deviate from it, causing them to censor their own testimony before a trial judge has

even had the opportunity to determine whether it is reliable. (After all, if Dr. Austin had known before he testified in the *Ayers* malpractice case that his testimony (which the trial judge held was reliable) would end up costing him hundreds of thousands of dollars, he probably wouldn't have given it.) While the trial judge would still make the decision whether to admit or exclude testimony, this decision would be made in a narrower field, from which any opinion by a plaintiffs' expert that is not "generally accepted" has already been removed.

CONCLUSION

For the foregoing reasons, this Court should issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

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